United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

294

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,505

TEXTILE AND APPAREL GROUP, AMERICAN IMPORTERS ASSOCIATION, et al.,
Appellants,

v.

FEDERAL TRADE COMMISSION, et al.,
Appellees

APPELLANTS' BRIEF

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STATEMENT OF ISSUES

1. Whether under the Wool Products Labeling Act, and the due process clause of the United States Constitution, the Federal Trade Commission can bar distribution of wool products, alleged to be misbranded, without a hearing on the issue of misbranding and the entry of a reviewable order.

2. Whether the Federal Trade Commission, under color of its rule-making power, may convert its statutory authority to issue cease and desist orders against misbranded wool products into a licensing

scheme barring the distribution of all imported wool products until the importer proves the absence of misbranding.

STATEMENT OF THE CASE

This is an appeal from an order granting summary judgment and dismissing a suit to declare invalid and enjoin the enforcement of a new regulation of the Federal Trade Commission, known as "Rule 36", which purports to impose a comprehensive new regulatory scheme upon the sale and distribution in commerce of wool products imported from abroad. It prohibits the shipment and distribution of such imports in commerce unless and until they are released by the Commission, and empowers anonymous members of the Commission's staff to decide arbitrarily whether or not to release them.

The regulation in question[1] was issued on December 22, 1967 over the strong dissent of Commissioner Elman (App. 40).[2] Two of the other three Commissioners who participated in its issuance had also expressed serious reservations concerning the validity of its principal provisions prior to its issuance.[3] The effective date of the regulation was February 12, 1968.

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[1] The full text of the regulation, together with the Commission's "Statement of Basis and Purpose" and Commissioner Elman's Dissenting Opinion is set forth as Exhibit "C" to the Complaint below (App. 22). A pamphlet copy of the regulation itself is attached as Document A of Appendix II.

[2] "App." page numbers refer to Volume I of the Appendix consisting of selected portions of the record below. Volume II of the Appendix herein consists of pamphlet copies of the regulation and statutes involved, and certain legislative proceedings cited by the parties. The documents in Volume II are designated by letters A through G.

[3] On November 1, 1967, Commissioner Mary G. Jones filed a Separate Statement objecting to two provisions of Rule 36, i.e.: "(1) the provisions deny-

On February 5, 1968, the American Importers Association and 34 individual concerns engaged in the importation of wool products, filed this action for declaratory judgment and injunctive relief on behalf of themselves and other importers affected by the new regulation. The Complaint alleges that the novel restrictions and procedures improvised by the Commission in the said regulation exceed the Commission's authority under the Wool Products Labeling Act and the Federal Trade Commission Act and that they violate the procedural safeguards of plaintiffs' rights which Congress provided in those statutes and in the Administrative Procedure Act. A separate count alleges that if the Wool Products Labeling Act were construed to authorize the procedure adopted by the Commission in Rule 36, it would violate the due process clause of the Fifth Amendment.[4]

On February 9, 1968, the plaintiffs applied for a preliminary injunction and temporary restraining order against enforcement of the new regulation by the Commission pending the determination of its validity upon the merits of the Complaint herein. The Court,

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ing the importer the option of furnishing either test results or samples for the Commission to test, and (2) requiring the importer to bear the expenses of testing which the Commission may require." Although Commissioner Jones did not re-file her statement when the rule was finally issued on December 22, 1967, the provisions to which she objected in the earlier version remain unchanged in the rule as issued. See also concurring opinion of Commissioner MacIntyre of September 30, 1965, in R. H. Macy & Co., FTC Docket 8650 wherein he expresses "considerable doubts" about the authority of the Commission to promulgate any regulation "requiring the testing of wool products before their introduction in commerce." CCH Trade Regulation, ¶ 17344, p. 22509.

[4]In another separate count, the Complaint alleged violation of the General Agreement on Tariffs and Trade, an executive agreement between the United States and 74 foreign countries; but plaintiffs did not seek summary judgment on that count since it involved disputed issues of fact, and they do not rely on it for purposes of this motion.

per Hart, J., denied the temporary restraining order; but on February 16, 1968, after a full day's hearing, specially set, it granted the preliminary injunction as sought. Judge Hart's ruling is set forth at App. 71, and the Findings of Fact and Conclusions of Law upon which the preliminary injunction was predicated is reproduced at App. 73.

At the aforesaid hearing of February 16, 1968, three associations of manufacturers engaged in the domestic production of wool products sought and were granted leave to intervene in opposition to the Complaint below. They are: The National Association of Wool Manufacturers, the Northern Textile Association and the National Knitted Outerwear Association. On April 24, 1968, the said Intervenors noted an appeal to this Court from the preliminary injunction entered by Judge Hart.[5]

On April 9, 1968, the Government filed a motion to dismiss or in the alternative for summary judgment "on the grounds that the Complaint fails to state a claim on which relief can be granted and that there is no genuine issue of any material fact and defendants are entitled to judgment as a matter of law". App. 78.

On May 20, 1968 plaintiffs filed a cross-motion for summary judgment upon the ground that "Rule 36" exceeded the defendants' statutory powers and violated the procedural safeguards of plaintiffs' rights under the Wool Products Labeling Act, the Federal Trade Commission Act and the Administrative Procedure Act. App. 117. The intervenors followed on June 21, 1968 with a motion to dismiss for lack of jurisdiction, asserting that no justiciable case or controversy was presented by the Complaint. App. 119.

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[5] *National Knitted Outerwear Association, et al. v. Textile and Apparel Group, et al.*, No. 22,149. That appeal was never briefed or argued; it was dismissed by this Court's order of December 5, 1968 upon motion of the appellants therein.

The Decision Below

All three motions were heard by Judge Corcoran, District Judge, on the regular motions' calendar for October 16, 1968. The Court heard counsel for each of the parties in support of their respective motions but allowed no time for rebuttal argument (Transcript p. 51). On October 19, 1968, the Court granted defendants' motion for summary judgment; denied plaintiffs' motion for summary judgment; and granted the intervenors' motion to dismiss. Counsel were so advised by postcard from the Clerk's Office. No written opinion was issued and the Court made no oral comments from the bench which shed any light on the reason for the decision.

The Court granted the Government's motion for summary judgment on the merits and the intervenors' motion to dismiss for lack of jurisdiction in the same order (App. 121); but it gave no indication as to whether the determining factor in its decision was the intervenors' argument that the case was not ripe for adjudication (Transcript, pp. 29-40) or the Government's argument that notwithstanding the lack of any provision for notice, hearing, or a reviewable order in the regulation itself, an aggrieved importer could get a hearing on the issue of misbranding in the Customs Court or in the District Court. (Transcript, pp. 5-6) The form of order submitted by the Government and signed by the District Judge on November 4, 1968, (App. 121) made the granting of intervenors' motion to dismiss for lack of jurisdiction follow from the granting of the Government's motion for summary judgment on the merits but this attempted rationale hardly reconciles the underlying inconsistency.

Judge Hart had granted the preliminary injunction against enforcement of the rule in spite of his "extreme reluctance to enjoin any branch of the executive department" because: "[I]t does appear to the Court that Rule 36 clearly fails to provide due process,

in that it does not provide any proper method whereby an importer will receive notice, hearing, and review procedures of decisions to in effect bar his products or forfeit his bond." App. 71.

In granting summary judgment on the merits and vacating Judge Hart's preliminary injunction, Judge Corcoran did not explain whether he did so because he found that the regulation did provide for a due process hearing, or because he did not find any legal requirement for such a hearing. A subsequent ruling of Judge Corcoran's suggests that he completely misunderstood the basis for Judge Hart's earlier decision.

In denying plaintiffs' Motion for Stay Pending Appeal,[6] Judge Corcoran made the following observation from the bench:

> "I am conscious of the fact that Judge Hart did issue a preliminary injunction, but if I read the papers correctly, it wasn't on any of the points that have been raised before me. It was on the question of whether a proper hearing had been accorded the parties and not on the issues that have been presented in my Court." App. 123.

The issue before Judge Hart was not whether the parties to this action had been accorded a hearing by the Commission prior to the promulgation of Rule 36. It was not the lack of a proper rule-making hearing, but the lack of any provision for an adjudicatory hearing in the regulation itself that was the basis for Judge Hart's preliminary injunction. This was likewise the gravamen of the Complaint below as well as plaintiffs' motion for summary judgment, as

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[6]On October 28, 1968 plaintiffs moved in the Court below to stay the effectiveness of the decision below pending appeal and to continue in effect the preliminary injunction which had been previously entered, until this Court could determine the validity of Rule 36. Judge Corcoran denied this motion on November 6, 1968, and on November 8, 1968, this appeal was noted.

may be seen from Section I of the argument which follows, which is the argument made in Section I of plaintiffs' brief on the Motion for Summary Judgment below.

SUMMARY OF ARGUMENT

The new enforcement scheme for imports which the Commission has adopted in Rule 36 is substantially the same as the provision which the Commission unsuccessfully sought to have included in the Wool Products Labeling Act itself, and which was considered and rejected by the Congress in 1939 when the Act was passed.

Under the statutory enforcement scheme of the Wool Products Labeling Act as passed by Congress, the Federal Trade Commission has no power to bar the shipment or distribution of wool products in commerce except by issuing a complaint under § 5(b) of the Federal Trade Commission Act, proving misbranding at an adversary hearing before an impartial examiner, and entering a cease-and-desist order appealable under § 5(c), F.T.C.A.

Contrary to the Wool Products Labeling Act, Rule 36 creates a presumption that all wool imports entering the United States, are misbranded unless and until the importer proves otherwise. It bars their shipment and distribution in commerce unless and until they are "released", and the decision to release them or not is made ex parte by unidentified subordinate employees of the Commission. No administrative hearing of any sort is provided. No record is made. No findings of fact or conclusions of law need be stated. No opportunity is afforded for judicial review.

The enforcement provisions of the Wool Products Labeling Act as passed by Congress were made to apply with equal force to imported and domestic wool products alike. The additional sanction of the penal bond contained in § 8 of the Act was made specially

applicable to importers, but only as a penalty for violation, proved after hearing in accordance with the procedure set forth in § 5(b) of the Federal Trade Commission Act. Under Rule 36, all importers of wool products are subjected to forfeiture of liquidated damages for failure to redeliver their goods upon demand by the Commission, whether or not they have made any false representations or mislabeled any goods.

Rule 36 in effect rewrites the Wool Products Labeling Act so as to convert the Commission's statutory power to issue cease-and-desist orders into an assumed power to grant and deny licenses. After 30 years of enforcing the Act by means of the remedies provided by Congress, the Commission has now decided that it needs the additional licensing powers over imports which Congress refused to confer at the time the law was passed. Instead of going back to Congress and asking it to enlarge its authority, however, the Commission simply assumed the additional powers, ipse dixit, and persuaded the court below that what it was doing was just rule-making.

The decision below not only confers upon the Commission powers which Congress, in its wisdom, decided to withhold; but it deprives the appellants, and other importers subject to the Commission's regulation, of the procedural safeguards which Congress explicitly provided in the Wool Products Labeling Act and the Administrative Procedure Act, and which the framers of the Constitution provided in the due process clause of the Fifth Amendment.

ARGUMENT

I.

THE NEW REGULATORY SCHEME FOR IMPORTED WOOL PRODUCTS WHICH THE COMMISSION HAS PROMULGATED IN RULE 36 EXCEEDS THE COMMISSION'S STATUTORY POWERS AND VIOLATES THE APPELLANTS' STATUTORY AND CONSTITUTIONAL RIGHTS.

A. The Wool Products Labeling Act sets forth the specific remedies available to the Commission for preventing the misbranding of Wool Products.

The Wool products Labeling Act (sometimes referred to herein as "W.P.L.A.") explicitly sets forth the remedies available to the Federal Trade Commission to ensure compliance with the Act's labeling requirements.

§ 6(a) of the Wool Products Labeling Act, 15 U.S.C. § 68d, entitled "Enforcement of the Act", provides that "except as otherwise specifically provided herein, this Act shall be enforced by the Federal Trade Commission under rules, regulations, and procedure provided for in the Federal Trade Commission Act" (sometimes referred to herein as "F.T.C.A.").[7] Section 6(a) goes on to specify that:

> The Commission is authorized and directed to prevent any person from violating the provisions of this Act in the same manner, by the same means, and with *the same jurisdiction, powers, and duties* as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act; *and any such person violating the provisions of this Act shall be subject to the penalties and entitled to the privileges and*

[7]Pamphlet copies of the Wool Products Labeling Act and the Federal Trade Commission Act are attached in Appendix II as documents "B" and "C" respectively.

> *immunities provided in said . . . . Act*, in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the applicable terms and provisions of the said Federal Trade Commission Act were incorporated into and made a part of this Act.

15 U.S.C. § 68d(a) (Emphasis supplied).

The Commission's enforcement powers under the Federal Trade Commission Act are set forth in § 5b of that Act, 15 U.S.C. § 45(b) which provides that whenever the Commission shall have reason to believe that any person is or has been engaging in any practice in violation of the Act, it shall issue a complaint stating the charges and giving notice of a hearing at which the respondent may appear and offer testimony in its own behalf. If after hearing, the Commission shall be of the opinion that the Act has been violated, it shall make written findings to that effect and shall issue an order requiring the respondent to cease and desist from the unlawful act or practice. § 5(c) of the Federal Trade Commission Act makes such cease and desist orders, appealable to a United States Court of Appeals; and § 5(1) provides that after such an order has become final, any person who violates it is liable to forfeiture and payment of a civil penalty in the amount of $5,000 for each violation or each day of continuance or failure to obey it.

The procedure summarized above for the entry of a cease and desist order is the only remedy which Congress provided for violation of the Federal Trade Commission Act and it is the principal remedy provided for enforcement of the Wool Products Labeling Act. In addition to this principal remedy, Congress also provided in the Wool Products Labeling Act for three ancillary enforcement remedies, added specifically to prevent misbranding of wool products, i.e.:

§ 7(b), W.P.L.A., (15 U.S.C. § 68e (b)) which authorizes the Commission to seek and obtain a preliminary injunction in a United States District Court enjoining the misbranding of wool products until the Commission issues a complaint and cease and desist order under § 6(a) of the Act;

§ 7(a), W.P.L.A., (15 U.S.C. 68e (a)) in which the United States District Court is authorized to seize and confiscate misbranded wool products upon a proper showing by the Commission; and

§ 8, W.P.L.A., (15 U.S.C. § 68f) which provides for the imposition of a penal bond upon the shipment of wool products by an importer found to have falsified or omitted the required documentation on shipments from abroad.

All of the foregoing enforcement provisions of the Wool Products Labeling Act apply with equal force to imported products as well as domestic products with the sole exception of § 8 which applies exclusively to imports.

§ 8 requires that all imports of wool products into the United States shall be accompanied by invoices setting forth the information required under the Act and provides that the failure to set forth the required information in the said invoices or the falsification of any invoice or consignee's declaration shall be considered an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act. It provides that any person who falsifies or fails to set forth the said information in the said invoices or in the said declaration, "may *thenceforth* be prohibited by the Commission from importing, or participating in the importation of any wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of the said wool products and any duty thereon, conditioned upon compliance with the provisions of this Act." 15 U.S.C. § 68f (Emphasis added.)

Under the statutory enforcement scheme, the Federal Trade Commission has no power to stop the shipment or distribution of wool products in commerce except by issuing a complaint under § 5(b), F.T.C.A., proving misbranding at an adversary hearing before an impartial examiner, and entering a cease and desist order appealable under § 5(c), F.T.C.A. And the Commission has no authority to impose the penal condition of a bond upon a shipment of imported wool products unless the importer has been previously found to have falsified an invoice in violation of § 8, W.P.L.A.

In Rule 36, the Commission has sought to impose what amounts to a preliminary injunction upon the shipment of imported wool products without ever having applied to any District Court therefor under § 7(b), W.P.L.A., supra; and it has conditioned the shipment of imported products upon the posting of a penal bond, whether or not the importer has previously falsified an invoice or declaration in violation of § 8 of the Act. The new regulation in effect rewrites the Wool Products Labeling Act so as to convert the Commission's statutory power to issue cease-and-desist orders into an assumed power to grant and deny licenses. Instead of making the Commission's staff prove misbranding before shipment of an importer's goods is prohibited, as required by the Act, the regulation makes the importer prove that his goods are not misbranded before they are licensed or "released" for shipment without liability for liquidated damages under the bond.

This is not a case where the plaintiffs are trying to second-guess the Commission in the area of its expertise. Nor is the issue in this case of the reasonableness of an action taken by the Commission in the exercise of its discretion. The issue here is whether the Commission in the first instance had the power to adopt a new enforcement remedy which Congress never authorized and which Congress expressly rejected when it passed the Wool Products Labeling Act.

B. In enacting the Wool Products Labeling Act, Congress refused to confer upon the Federal Trade Commission licensing powers over imports or the power to prohibit the shipment of imports prior to a finding of violation and the entry of a cease-and-desist order.

The remedy which the Commission now purports to enforce in Rule 36 was considered and rejected by Congress in 1939 when the Wool Products Labeling Act was passed. A separate enforcement scheme for imported wool products was included in the Bill as originally reported out of the Committee on Interstate Commerce. Its provisions, although not as arbitrary as those adopted by the Commission in Rule 36, were similar in substance.[8] Section 8 of the original bill provided as follows:

EXCLUSION OF MISBRANDED WOOL PRODUCTS

> Sec. 8. (a) Whenever the Commission has reason to believe that any wool product is being imported, or offered for import, into the United States from any foreign country, in violation of the provisions of this Act, it shall give due notice and opportunity for appearance and hearing to the owner or consignee of said wool product, who shall have the burden of proof to show said wool product is not being imported, or offered for import, in violation of the provisions of the Act.
>
> Upon giving notice of opportunity for appearance and hearing to such owner or consignee, the Commission shall certify that fact to the Secretary of the Treasury, who shall thereupon—

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[8] It is interesting to note that the remedy proposed by the Interstate Commerce Committee (1) did not apply automatically to all imports of wool products entering the country, as does Rule 36, but only in those instances where the Federal Trade Commission had reason to believe that imports were misbranded; and (2) that although the burden of proof on the issue of misbranding was imposed upon the importer, he was entitled under the Committee Bill to notice and hearing before distribution of his goods could be barred or conditioned upon the posting of a penal bond. In all other respects, § 8 of the 1938 Bill is substantially the same as the enforcement scheme promulgated by the Commission on December 28, 1967.

> 1. Refuse admission and delivery of such wool product to the said owner or consignee; or
>
> 2. Authorize admission and delivery of such wool product to such owner or consignee pending examination, hearing, and decision in the matter, upon the execution of a penal bond for the amount of the full invoice value of such wool product, together with the duty thereon. . . .

Senate Report No. 1685, 75th Congress, 3d Session, pp. 10-11 (Appendix II, Document "E").

That Bill, however, was never enacted. Section 8 of the Bill that was passed into law—and is the law today—made falsification of import invoices an unfair trade practice under § 5, F.T.C.A., and it imposed the condition of the bond only as a penalty for violation, supra, p. 9. In all other respects, the Act applied the same enforcement remedies to imports and domestic goods alike, and it gave importers the same procedural "rights, privileges and immunities" as domestic manufacturers.

The Federal Trade Commission was undoubtedly familiar with this legislative history when it promulgated Rule 36. The fact that the Commission and the domestic manufacturers tried and failed to get Congress to impose this restrictive scheme upon imports did not deter them. They simply adopted it themselves and called it rule-making. Instead of going back to Congress and renewing their plea for the additional powers over imports,[9] they chose to address their

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"[t]he Congress is in frequent session, its doors open and its committees ~ ›le. Its procedure is no more complicated than that of the courts. If an strative agency thinks that the real intent and purpose of a statute is broader than or different from its terms, it need only ask Congress for an enlargement or clarification. We are no longer in an age when such inquiry is impractical." *Border Pipe Line Co. v. Federal Power Commission*, 171 F.2d 149, 153, 84 U.S. App. D.C. 142, 146 (D.C. Cir. 1948).

policy arguments to the Court below and asked it to authorize the remedy which Congress refused to authorize.

C. The Commission's rule-making power does not authorize it to rewrite the Wool Products Labeling Act so as to convert its statutory cease-and-desist powers into licensing powers and deprive importers of the statutory hearing on the issue of misbranding.

The Commission relies on the rule-making power conferred by the third paragraph of § 6(a), W.P.L.A., as its authority for promulgation of Rule 36. It argued below that the power to make rules and regulations as may be necessary and proper for administration and enforcement of the Act "obviously does not limit the Commission to the procedure specified in § 5(b) of the Federal Trade Commission Act. Appropriate enforcement procedures can also be provided by rule-making."

It is a fundamental principle of administrative law, however, that "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law." *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134; 80 L.Ed. 528, 531; *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284, 296, 98 L.Ed. 699 (1954).

The rule-making power found in the third paragraph of § 6(a) W.P.L.A. does not confer upon the Commission the right to disregard the statutory enforcement scheme provided by Congress and to deprive importers of the privileges and immunities which Congress conferred in the second paragraph of § 6(a). It does not authorize the Commission to assume licensing powers that Congress refused to confer.

This basic principle was restated in Section 9 of the Administrative Procedure Act which provides that:

> "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b).

The Report of the Senate Judiciary Committee on the Administrative Procedure Act indicates that the assumption of licensing powers by an agency whose enforcement powers are limited to the issuance of cease-and-desist orders was just the kind of ultra vires action Congress sought to prohibit in enacting § 9 of the Act.

> "[A]gencies may not impose sanctions which have not been specifically or generally provided for them to impose. Thus, *an agency which is authorized only to issue cease-and-desist orders may not set up a licensing system;* and conversely a licensing authority may not assume to issue desist orders." *Administrative*

Administrative Procedure Act, Report of the Committee on the Judiciary, 79th Congress, 1st Session, Report No. 752, Sen. Doc. 248, p. 211. (Emphasis supplied.) Appendix II, Document "F.")

The Committee Report goes on to explain that under § 9 of the Act "a rule-making authority may not undertake to adjudicate cases." Ibid. The determination whether or not to release an importer's goods under Rule 36 constitutes an adjudication of the issue of misbranding.

Hence the Federal Trade Commission cannot lawfully bar the sale or distribution of wool products in commerce without providing the procedural safeguards of § 5(b), F.T.C.A.,[10] and if it seeks a preliminary injunction or seizure of the goods, it must file a complaint in the District Court and meet its statutory burden of proof

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[10] Cf. Administrative Procedure Act, 5 U.S.C. §§ 554, 556, and 557.

under §§ 7(a) and 7(b), W.P.L.A. In the administrative hearing under § 5(b), F.T.C.A., as in the two judicial remedies under § 7, W.P.L.A., Commission counsel has the burden of proving misbranding. Administrative Procedure Act, 5 U.S.C. § 556(d).

Rule 36, as Commissioner Elman recognized, "creates a presumption that wool imports entering the United States are misbranded unless and until the importer proves otherwise. The Commission's refusal to issue a notice of release need be supported only by its own *ipse dixit.* No administrative hearing of any sort is provided. No record is made. No findings of fact or conclusions of law need be stated. No opportunity is afforded for judicial review." Page 2 of Commissioner Elman's Dissent, Exhibit C to Complaint, Exhibit 2 to appellant's motion herein.

The government argued below that even though Rule 36 itself fails to provide any opportunity for hearing, an aggrieved importer could ultimately get a hearing on the issue of misbranding in a United States District Court or in the United States Customs Court. Under the regulation as promulgated by the Commission, however, the importer at no time gets a hearing on this issue. He does not get such a hearing before the Federal Trade Commission under the terms of the regulation itself. He does not get a hearing before the Customs Court because Rule 36 was not promulgated under the authority of any customs law[11]; and he would not get an evidentiary hearing on the substantive issue of misbranding in any District Court because the Wool Products Labeling Act does not confer jurisdiction on District Courts to try the merits of statutory violations (except in those special cases the Federal Trade Commission itself seeks relief under § 7(a) or (b)). He does not even get a hearing on the issue

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[11] *Precise Imports Corp. v. Kelly*, 218 F. Supp. 494 (D.C.S.D.N.Y., 1963), aff'd 378 F.2d 1014, 1016.

of misbranding if the Government brings suit for forfeiture of liquidated damages under the bond prescribed by Section (b) of Rule 36 as the condition for shipment and distribution of goods prior to their "release" by the Commission.[12]

The only remedy available to the importers whose rights are infringed by the Commission's Rule 36 is the relief sought in this action: i.e., a declaratory judgment that the Commission was without authority to promulgate the regulation in the first instance and injunctive relief against its enforcement.

II.

JUDICIAL REVIEW OF THE VALIDITY OF RULE 36 PRIOR TO ITS ENFORCEMENT IS ESSENTIAL SINCE NO OPPORTUNITY FOR REVIEW OF THE COMMISSION'S ACTIONS THEREUNDER IS AFFORDED BY THE REGULATION ITSELF.

The Supreme Court has recently established that judicial review of the validity of an administrative regulation, such as the one here at issue, is properly sought and granted prior to enforcement of the regulation against the industry affected. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Assn. v. Gardner*, 387

[12] Rule 36(c) provides that "the failure to redeliver wool products to Customs custody, after demand therefor, shall subject the importer to payment of liquidated damages as provided for in the bond . . . ." Nothing in the Regulation conditions forfeiture upon a finding of misbranding. In *Precise Imports Corp. v. Kelly*, supra, the Court of Appeals for the Second Circuit held that the government was entitled to forfeiture and liquidated damages under Form 7751 Customs Bond (the same form as used under Rule 36, Government's Exhibit B-1 below) upon the mere showing that the importer failed to redeliver the goods demanded by Customs; and that even if the importer obtained a declaratory judgment that he had not violated the underlying statute involved, it would not constitute a defense to the Government's suit for forfeiture under the bond. 378 F.2d 1014 (2d Cir., 1967), cert. den. 389 U.S. 973.

U.S. 158 (1967); *Gardner v. Toilet Goods Assn.*, 387 U.S. 167 (1967).

The *Abbott* case challenged the validity of a regulation of the Food and Drug Administration governing the labeling of pharmaceutical products. The Court, in an opinion by Mr. Justice Harlan, upheld the plaintiffs' right to the declaratory and injunctive relief sought. It held that:

> "Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here." 387 U.S. 153.[13]

In *Gardner v. Toilet Goods Association*, supra, the court affirmed the granting of a declaratory judgment invalidating three other regulations issued by the Food and Drug Administration pertaining to the testing and certification of color additives and injunctive relief against their enforcement. The regulations involved were "self-executing" and had "an immediate and substantial impact upon the respondents." 387 U.S. 167, 171.

The Federal Trade Commission's Rule 36 has the same impact on importers of wool products as a class as the regulations at issue in the above cases had on the industries there affected. It is "self-executing"; it has "an immediate and substantial impact" upon the plaintiffs; and it requires them to make significant changes in their every day business. It requires detention of their goods at the port

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[13] Cf. Administrative Procedure Act, 5 U.S.C. §§ 702, 703.

of entry and prohibits their shipment and distribution while employees of the Commission decide whether to release them or hold them for laboratory testing. It puts the said importers in jeopardy of default on contract delivery dates; it imposes unjustified and burdensome costs; and it subjects them to unfair and prejudicial handicaps in competing with the sellers and distributors of domestically manufactured goods. App. 46-60.

This is "a situation in which primary conduct is affected—when contracts must be negotiated, ingredients tested or substituted, [and] special records compiled." *Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 164.[14]

Even prior to the foregoing decisions of the Supreme Court, this Court had established that administrative action by the Federal Trade Commission affecting an entire industry was reviewable on a complaint for preliminary injunction and declaratory judgment. *B. F. Goodrich Co. v. Federal Trade Commission*, 208 F.2d 829, 93 U.S. App. D.C. 50 (D.C. Cir. 1953). That case involved an order of the Federal Trade Commission establishing quantity limits on automobile tires under the Robinson Patman Act. In an opinion by Judge Prettyman, the court reversed the District Court's dismissal of the complaint and remanded it to the District Court for consideration on the merits of the declaratory and injunctive relief sought, observing that "the contemplated effects of the order will be industry-wide" and

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[14]The regulation in *Toilet Goods Assn. v. Gardner*, a companion case to *Gardner v. Toilet Goods Assn.*, supra, required persons subject to the Act to permit employees of the Food and Drug Administration access to manufacturing facilities, processes and formulae involved in the manufacture of color additives. The court held that judicial review was premature since "refusal to admit an inspector here would at most lead only to a suspension of certification services to the particular party, a determination that can then be promptly challenged through an administrative procedure, which in turn is reviewable by a court." 387 U.S. 158, 165.

that "the threat of disruption of business as alleged in the complaints is immediate." Id. p. 834. Cf. *National Motor Freight Traffic Assn. v. United States*, 268 F. Supp. 90, 93 (D.C., 1967).

In all of the above cases, the regulations in question were only enforceable upon an appealable order entered after administrative proceedings and a finding of violation. The underlying issue in all of those cases was whether it was appropriate to grant review in a pre-enforcement suit for declaratory and injunctive relief or to wait until an administrative order had been entered upon violation, and an appeal or petition for review had been filed under the statute. No such alternative avenue of review is available here. Unlike the plaintiffs in the *Goodrich* case, and in the Food and Drug cases discussed above, the importers subject to Rule 36 have no administrative remedy or statutory appeal from decisions barring the sale or distribution of their goods.

The only provision for appellate review of Commission action under the Wool Products Labeling Act is § 5(c) of the Federal Trade Commission Act which provides for the filing in a United States Court of Appeals of a Petition for Review from orders to cease and desist entered by the Commission upon the record made after complaint, hearing and findings of fact. 15 U.S.C. § 45(c). Rule 36, however, makes no provision for the entry of an appealable order either by the Commission or by a Court. It purports instead to prohibit by administrative fiat the shipment and distribution of all wool products imported from abroad unless and until the Commission releases them. Since Congress never authorized the imposition of such a sweeping prohibition and/or restriction upon an entire class of wool products, it did not provide any statutory procedure for its appellate review.

Because there is no statutory appeal or other remedy at law available to the importers subject to Rule 36, the need for pre-enforcement review of the validity of that regulation is much stronger here than in any of the prior cases decided to date.[15]

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision below should be reversed and that the District Court should be directed to enter judgment

(a) declaring Rule 36 invalid under the Wool Products Labeling Act and the due process clause of the United States Constitution; and

(b) enjoining enforcement of the said regulation as prayed for by the Complaint herein.

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[14]Even the dissenting opinion of Mr. Justice Fortas in *Gardner v. Toilet Goods Association*, supra, recognized the propriety of pre-enforcement relief in a case like this where "constitutional issues or questions of administrative jurisdiction or of arbitrary procedure are involved" or where "the type of review available under the statute would not be 'adequate'". *Gardner v. Toilet Goods* Association, 387 U.S. 167, 177-178; 18 L. Ed. 2d 704, 711.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,505

TEXTILE AND APPAREL GROUP, AMERICAN IMPORTERS ASSOCIATION, et al.,
Appellants,

v.

FEDERAL TRADE COMMISSION, et al.,
Appellees

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

I.

WHATEVER AUTHORITY THE TARIFF ACT OF 1930 MAY VEST IN THE CUSTOMS SERVICE, IT CANNOT BE INVOKED BY THE FEDERAL TRADE COMMISSION TO JUSTIFY ITS DISREGARD FOR THE REQUIREMENTS OF THE WOOL PRODUCTS LABELING ACT.

Recognizing the wide discrepancy between the statutory requirements of the Wool Products Labeling Act and the provisions of Rule 36, the Commission has belatedly cast about in an effort to find another statute which would provide some colorable legal authority for its new regulatory scheme.

1. The first extraneous authority the Commission sought to invoke was the Food and Drug Law which, unlike the Wool Products Labeling Act, explicitly prohibits the importation of foods, drugs and cosmetics that may be "adulterated, misbranded or in violation [of the Food and Drug Law]" 21 U.S.C. § 381(a).[1] See separate opinion of FTC Chairman, Rand Dixon, App. 81.

2. The Commission now falls back on another extraneous statute, i.e.: The Tariff Act of 1930 which authorizes the United States Customs Service to condition the delivery of imported merchandise from Customs custody upon a bond

> "to assure compliance with all applicable laws, regulations and instructions which the Secretary of the Treasury or the Customs Service is authorized to enforce until it has been inspected, examined or appraised and is reported by the appraiser to have been truly and correctly invoiced and found to comply with the requirements of the laws of the United States."

Tariff Act of 1930, 19 U.S.C. § 1499, Appendix II, Doc. D. The Commission's attempt to take refuge behind the skirts of the Customs Service, however, is equally futile.

The Federal Trade Commission, not the Customs Service, is the administrative agency charged with enforcement of the Act's label-

[1] The Chairman of the Commission argued that "Rule 36 does conform to the statutory pattern established by Congress in the case of imported foods, drugs, devices and cosmetics. . ." App. 84. Replying to Commissioner Elman's Dissenting Statement characterizing Rule 36 as "a classic example of burning the house down in order to roast the pig" (App. 43), the Chairman argued that "the statutory provisions enacted by Congress to deal with imported food, drugs, devices and cosmetics, which Commissioner Elman would contrast with Rule 36, do not require that agency action be taken on the record and do not provide a right of judicial review." App. 83. The Chairman's Opinion did not cite any similar provision in the Wool Products Labeling Act, however.

ing requirements. Unlike the Food and Drug Act, 21 U.S.C. § 381(a), the Federal Hazardous Substance Act, 15 U.S.C. § 1273, or the Trademark Act of 1946, 15 U.S.C. 1125, the Wool Products Labeling Act contains no ban or prohibition upon importation except where an importer has previously been found in violation of the invoicing requirements of § 8.

3. The Government attempts to read into Section 8 of the Act a prohibition against the importation of misbranded wool products similar to that contained in the above statutes.[2] As we have previously shown, however, (Appellants' Brief, pp. 11-15), Congress in enacting Section 8 of the Wool Products Labeling Act refused to bar the importation of unlicensed or unbonded imports, as originally recommended by the Committee on Interstate Commerce. Instead, it imposed special disclosure requirements and made falsification of the required information in customs invoices relating to wool products "an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act." It thereby designated the Federal Trade Commission, and not the Secretary of the Treasury or the Customs Service, as the tribunal to determine the truth or falsity of wool products labeling and invoicing. The enforcement remedy for unfair trade practices is a cease-and-desist order entered in accordance with the procedure set forth in § 5(b) of the Federal Trade Commission Act. And under § 8, only importers who have been so found to have falsified the required information may "thenceforth" be prohibited by the Customs Service from importing without filing customs bond.

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[2]In promulgating Rule 36, the Commission, itself, did not try to stretch § 8, W.P.L.A. into a ban on all wool products whose labeling has not been approved in advance. § 8 was not one of the provisions cited by the Commission as authority for Rule 36. See Statement of Basis and Purpose, App. 32.

4. The enforcement scheme of Section 8 is clear and unambiguous. Its plain language can be construed by this court within the four corners of the Wool Products Labeling Act itself and without reference to what particular Congressmen may have said at the hearings which preceded it or at Appropriations Committee hearings which followed many years later.[3]

Nevertheless, the Government would have this court infer from an ambiguous comment by a Senator that in substituting the invoice disclosure requirement and the bond penalty for the licensing scheme stricken from § 8 of the original Bill (App. II, Document E), Congress was not really making any change at all. It suggests that in deleting a provision authorizing the Commission to bar the importation of wool products until they have been tested and licensed, Congress intended to have the Federal Trade Commission and/or the Customs Service do the exact same thing by rule-making. The statement of Senator Schwartz, on which the Government relies, pointedly

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[3]The Government argued below and in its Opposition to Appellants' Motion for Injunction Pending Appeal in this Court (p. 3) that "Rule 36 was in fact promulgated at the strong urging of Congress", citing the colloquy between the Commission and a few protectionist Congressmen from the large textile-producing states as reported in recent hearings of Congressional Appropriations Committees (Exhibits 1 through 6 attached to Affidavit of Henry Stringer, Director of Bureau of Textiles and Furs, App. II, Doc. G). See also F.T.C. Brief, p. 7. These self-serving statements were made in the course of appropriations hearings at which the merits of Rule 36 were not at issue and before a Committee which had no jurisdiction to initiate amendments to the Wool Products Act. While appellants do not deny the influence of Congressmen on these strategic appropriations committees can bring to bear on the policy of administrative agencies, we do deny that pressure by individual Congressmen on behalf of constituents represents an ex post facto expression of legislative intent by the Congress as a body.

observes that the new provision was substituted so as to avoid "the unjust burden that might be imposed on importers under S-3502."[4]

The Senator goes on to observe that the new provision "follows the principle and utilizes the forms and procedures provided for in the Tariff Act of 1930." The Government would read into this imprecise statement, an intention on the part of the Congress to impose the same "unjust burden" on importers indirectly through administrative action under a catch-all clause in 19 U.S.C. § 1499 as it refused to impose in the statute itself. The "customs principle, forms and procedure" to which the Senator referred, however, was not any catch-all clause in another statute, but the explicit provisions Congress enacted in Sec. 8, itself, calling for the inclusion of additional wool content information in the invoices and other customs documents required by the Tariff Act of 1930, and prohibiting the importation of wool products by any person found to have falsified the required documents, except upon filing bond with the Secretary of Treasury. 15 U.S.C. Sec. 68f.

That this was the understanding of the Federal Trade Commission at the time the bill was passed is indicated by the testimony of Henry Miller, Assistant Director of the Commission's Bureau of Fair Trade Practices, who appeared on behalf of the Commission at the hearing of the House Committee on Interstate and Foreign Commerce, "to assist the committee in making an explanation of the differences which exist in the present bill . . . and the bill on which hearings were held last year. . ." . Hearing of House Committee on Interstate and Foreign Commerce re HR 944, 76th Cong., 1st Session, March 1, 1939, p. 11. At that hearing, the

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[4]Hearings before Subcommittee of Senate Committee on Interstate Commerce on S-162, Wool Products Labeling Act of 1939, 76th Congress, 1st Sess., at p. 7. F.T.C. Brief, p. 21.

following colloquy took place between Congressman Wolfenden and Mr. Miller:

> "Mr. Wolfenden. With reference to imported fabrics—and we import too much cloth, in my opinion—suppose a manufacturer on the other side labels merchandise 'all wool'. What are you going to do in a case of that kind?
>
> "Mr. Miller. This bill provides quite stringent provisions in regard to imports. It provides that the Customs Bureau can put the importer—the importing concern—under bond, and may even exclude their products from entry *when they once have been known to falsify a label.*" Id. p. 21. (Emphasis supplied.)

Nowhere in Mr. Miller's testimony is anything said about prohibiting importation of wool products or imposing the bonding requirement on importers *before* they have been found to have falsified a label or invoice, as the Federal Trade Commission now seeks to infer as an afterthought. And nowhere in Mr. Miller's testimony is there any suggestion that the Federal Trade Commission or Customs intended to treat imports differently from domestic products by testing them before they were offered for sale in commerce.

5. The extent of the authority over wool products conferred upon the Secretary of the Treasury by the catch-all clause of 19 U.S.C. § 1499 has never been judicially considered in any reported case to date. No decisions construing or applying its general language have been cited by the Government's Brief and we have found none. It is unnecessary, however, to decide this question of first impression on this appeal; for it is clear under the Administrative Procedure Act, that whatever authority the Secretary of the Treasury or the Customs Service may have by virtue of 19 U.S.C. § 1499,

it cannot be borrowed by the Federal Trade Commission for the purpose of this case,

§ 9 of the Administrative Procedure Act, prohibits an administrative agency from imposing any sanction or substantive rule "*except within jurisdiction delegated to the agency* and as authorized by law" (5 U.S.C. § 558(b), emphasis added). The report of the Senate Judiciary Committee on the Administrative Procedure Act, explains that this provision means that *"no agency may undertake directly or indirectly to exercise the function of some other agency.* The sub-section confines each agency to the jurisdiction delegated to it by law." (Emphasis added.) Appendix II, Document F.

The Customs Service itself has issued a regulation purporting to exercise whatever statutory authority it may have over wool products by virtue of 19 U.S.C. § 1499.[5] If all that the Commission contemplated in Rule 36 was to cooperate with the Customs Service in its enforcement of 19 U.S.C. § 1499, as the Government now asserts, the issuance of a brand new regulation, which on its face purports to be a self-sufficient, comprehensive and independent regulatory scheme, was hardly necessary. Rule 36 does not supplement the existing Customs regulation; it supersedes it.

6. The Administrative Procedure Act also provides that Notice of Proposed Rule-Making shall be given setting forth, inter alia, "reference to the legal authority under which the rule is proposed". 5 U.S.C. § 553(b)(2). Neither the Notice of Proposed Rule-Making under which Rule 36 was issued or the Statement of Basis and Purpose that was incorporated in the regulation as finally published, cited the Tariff Act of 1930 as authority for the regulation. § 6(a) of the W.P.L.A. was the only authority cited. App. 37.

[5] 19 C.F.R. § 11.12. F.T.C. Brief, p. 12.

The Federal Trade Commission in its Notice of Proposed Rule-Making for Rule 36 made no reference to the Tariff Act of 1930 or to the regulation issued by the Customs Service thereunder. At no time during the course of the 15-month rule-making proceeding that led up to the issuance of Rule 36 did the Commission invoke authority under that statute. It cannot retroactively rely on it now that the regulation has been finally issued. Cf. *National Motor Freight Traffic Assn. v. United States*, 268 F. Supp. 90 (D.C. 1967).

7. Congress in the Wool Products Labeling Act constituted the Federal Trade Commission as the expert tribunal for adjudicating questions of wool products labeling and it explicitly provided for the procedure to govern such adjudications. The statutory scheme of the Wool Products Labeling Act purported to cover, and it did cover, both domestic and imported wool products.

The provision of the Tariff Act of 1930 authorizing the Secretary of Treasury or the Customs Service to retain custody of imported merchandise until it has been "inspected, examined or appraised and is reported by the appraiser to have been truly and correctly invoiced and found to comply with the requirements of the laws of the United States" does not supersede the specific regulatory scheme for wool products which Congress enacted in the Wool Products Labeling Act. Where Congress intended to authorize the Customs Service to bar the importation of commodities prior to a finding of misbranding, it has done so in clear and unmistakable language. Food and Drug Act, 21 U.S.C. § 381, the Hazardous Substances Act, 15 U.S.C. § 1273, and the Trademark Act, 15 U.S.C. § 1125. Cf. *Sugarman v. Forbragd*, 267 F. Supp. 817 (N.D. Calif., 1967). It did not do so in the case of the Wool Products Labeling Act. As the Court of Appeals for the 9th Circuit stated with regard to another Federal Trade Commission rule:

> "We do not think it proper for this court to amend the Federal Trade Commission Act nor to permit it to be amended by a Commission rule, in the absence of a stronger showing of congressional intent than has been made here, and in the presence of express provisions in the enabling legislation creating other agencies . . . to accomplish the result sought."

Flotill Products, Inc. v. Federal Trade Commission, 358 F.2d 224, 230 (9 Cir., 1966).

II.

THERE IS NO JUSTIFICATION IN LAW FOR THE FEDERAL TRADE COMMISSION'S ATTEMPT TO ADJUDICATE ISSUES OF MISBRANDING OF WOOL PRODUCTS, IMPORTED OR DOMESTIC, WITHOUT A HEARING.

Notwithstanding the clear language of the Wool Products Labeling Act that any person violating the Act shall be "subject to the penalties and entitled to the privileges and immunities provided in Federal Trade Commission Act" (§ 6(a), W.P.L.A.), the Government argues that the Commission is not required to accord an importer the statutory hearing provided by § 5(b), F.T.C.A.

It blatantly asserts that Commission employees can require detention of an importer's goods indefinitely without any hearing at all. And it sees no violation of due process in the Commission's attempt to adjudicate charges of misbranding ex parte by arbitrary decree of its own enforcement officials.

It admits that under Rule 36 the determination whether to bar the sale and distribution of an importer's goods is made ex parte by an anonymous Commission employee on the basis of a report from a private testing laboratory selected by the Commission. It admits that this determination is made without any hearing at which an

importer can cross-examine the laboratory technician who made the test,[6] without any opportunity to adduce countervailing evidence, without any findings of fact and without the issuance of any order. The Government does not deny that under Rule 36, the importer's goods are automatically detained at the port of entry until they are released by an employee of the Commission and that the mere failure of a Commission employee to act constitutes the sanction. Once an importer's goods are detained at the port, neither the Federal Trade Commission nor any of its employees need do anything before the goods rot in the warehouse. The importer has no right to obtain release of his goods no matter how many tests are performed or what the results may have been.

The Government's defense of this flagrant denial of due process is threefold:

(1) The Commission does not intend to enforce Rule 36 unfairly or arbitrarily. (2) Even if the Commission does act arbitrarily, an importer has no rights because Congress has the power to prohibit the importation of anything it may choose without providing for a hearing and the Federal Trade Commission can exercise this Congressional power by administrative rule-making. (3) If this exercise of unbridled power offends the conscience of the Court, some importer may some day be able to persuade some District Court, or perhaps the Customs Court, to give him a hearing although the Government itself recognizes that this is most unlikely since Congress has not conferred jurisdiction on either the Customs Court or the United States District Courts to try disputed factual issues of

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[6]Under Rule 36, the required testing is performed by a laboratory designated by the Commission, under test methods and sampling procedures designated by the Commission and this test result is conclusive on the issue of fiber content. Rule 36(e). It is not even clear that the importer has a right to see the laboratory report, let alone to cross-examine the person who prepared it.

wool products content and labeling under the Wool Products Labeling Act or a regulation purportedly issued thereunder.

1. The Commission's first point—the matter of its good intentions—does not require serious argument. If the intentions of Government officials in exercising arbitrary power were germane to the issue of due process, our Government would not be the constitutional democracy it is today. Whenever a law is challenged as violating the due process clause, the official charged with enforcement generally proclaims his good intentions.

We do not for a minute doubt the Commission's good faith or its good intentions in administering Rule 36. We concede that Federal Trade Commission officials would try to be fair in adjudicating questions of misbranding that may arise with regard to wool imports. Questions of wool content and labeling are not simple, cut and dried matters that can be mechanically determined, however.

As the Commission's own Hearing Examiner recognized in a case that was closely identified with the issuance of Rule 36, the testing of wool products "is not an exact science."[7] No machine has yet been invented that will automatically measure the percentages of the various component fibers in a given fabric. The testing of wool products containing the various blends of wool, reused wool, reprocessed wool, cashmere, mohair, etc., is an expensive and laborious process. It involves problems in the selection of a representative sample to be tested, the microscopic examination of the sample, measurement of fiber diameters under microscopic projection, and the counting of individual fibers of various descriptions and measurements by human beings exercising subjective judgment and subject to human error. App. 61 to 64. The problems

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[7]Trial Examiner's Initial Decision *In the Matter of R. H. Macy & Co.*, F.T.C. Docket No. 8650, Finding No. 112, App. 64.

encountered in the *Macy* case, are indicative of the kinds of problems that continually arise in the administration of the Wool Products Labeling Act. App. 50-51.

Government officials—even employees of the Federal Trade Commission with the best of intentions—are not infallible. That is why Congress in its wisdom decided that the only reliable way to determine the true facts on disputed issues of wool product labeling is by means of an adversary hearing on a record made before an impartial examiner with findings and order subject to review as provided in Sec. 5 of the Federal Trade Commission Act.

2. This Court does not, therefore, have to reach the question of whether the Wool Products Labeling Act would have been unconstitutional if Congress had not provided for such a hearing. The Government's reliance on the 1904 decision in *Buttfield v. Stranahan* is in any case misplaced.[8] Even if the Government's reading of

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[8]The statute in that case prohibited the importation of the lowest grades of tea which, the court held, "in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute". *Buttfield v. Stranahan*, 192 U.S. 470, 496. The importer in that case asserted that he has "a vested right to engage as a trader in foreign commerce and as such to import teas into the United States . . ." and that the establishment and enforcement of the legislative standard deprived him of property without due process. Id. 492. The Supreme Court relying on the plenary power of Congress over foreign commerce, held that the importer was not entitled to a hearing with regard to the standards fixed by the Secretary of the Treasury under authority delegated by the statute. The *Buttfield* case involved substantive due process and is hardly dispositive of the procedural due process issue raised by Rule 36. Nothing in Justice White's Opinion in that case holds that Congress can empower the Secretary of the Treasury or other executive department or agency to adjudicate statutory violations involving fraud or misrepresentation without a due process hearing.

Buttfield is correct,—which we seriously doubt[9]—and Congress in the exercise of its powers over foreign commerce could have directed the exclusion of misbranded imports without a hearing, it does not follow that the Federal Trade Commission can do the same thing in the exercise of its rule-making authority. Whatever the outer limit of Congressional power over imports may be, Congress has not exercised it with regard to wool products; not has it authorized the Federal Trade Commission to do so for it.

Congress has authorized neither the Federal Trade Commission nor the Customs Service to arbitrarily decide issue of wool products misbranding without a hearing. The most Congress has authorized Customs to do in the first paragraph of § 8, W.P.L.A. is to see to it that imports are "stamped, tagged or labeled" in the form prescribed by the Act to show wool content and that the invoices accompanying shipment set forth the required information. The determination whether the wool content is in fact as represented on the label and whether the information set forth in the invoice is true or false must be made by the Federal Trade Commission after hearing, finding and reviewable order as prescribed by Sec. 5 of the Federal Trade Commission Act.

None of the cases cited by the Government's Brief hold that an administrative agency may adjudicate questions of statutory violation without a due process hearing.

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[9]The Government cites the *Buttfield* case for the proposition that the power of Congress over foreign commerce is so broad that Congress could have directed the exclusion of misbranded products without an adjudicatory hearing on the issue of misbranding. It has cited no judicial decision in which the *Buttfield* case has been so applied, however, and there have in fact been no such cases in the 65 years since *Buttfield* was decided. The issue has not arisen because in every instance where Congress has prohibited the importation of misbranded products, or products otherwise tainted by fraud, it has provided for a hearing on the issue of fraud. Cf. *Food and Drug Act*, *Hazardous Substances Act* and *Trademark Act*, supra, p. 9.

The *Moog Industries* and *Universal-Rundle* cases cited by the Commission both involved cease-and-desist orders issued by the Commission under Sec. 5(b) of the Federal Trade Commission Act.[10] The issue before the Court was the Commission's discretion to select cases for prosecution in the exercise of its statutory power under that section of the Act. In both cases the Commission proceeded after notice, hearing and written findings of fact; and it entered a reviewable order as provided in Sec. 5(b) F.T.C.A.

Similarly in *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, the Food and Drug Administration was acting as party plaintiff, not as judge. The issue was whether the Food and Drug Administration could bring suit for seizure of misbranded articles without holding an administrative hearing on the issue of probable cause.[11] Like the Food and Drug Act provision involved in *Ewing v. Mytinger & Casselberry*, the Wool Products Labeling Act provides for seizure of misbranded goods and like the Food and Drug Act, it also provides for a judicial hearing in the District Court on the Government's complaint. W.P.L.A. § 7(a). If the Commission pro-

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[10] *Moog Industries v. Federal Trade Commission*, 355 U.S. 411 (1958); *Federal Trade Commission v. Universal-Rundle*, 387 U.S. 244 (1967).

[11] In *Abbott Laboratories v. Gardner*, the Supreme Court disposed of *Mytinger* with the following comment:

> "To equate a finding of probable cause for proceeding against a particular drug manufacturer with the promulgation of a self-operative industry-wide regulation, such as we have here, would immunize nearly all agency rulemaking activities from the coverage of the Administrative Procedure Act."

387 U.S. 136, 147; 18 L. ed. 2d 681, 691.

ceeded in accordance with that statutory remedy, there would be no question as to an importer's right to hearing and no violation of due process. The Commission, however, has ignored the remedies provided by Congress and fashioned its own remedy in Rule 36 that impounds an importer's goods without any hearing at all, either before the goods are detained or thereafter.

3. The Government has answered its own argument that the Customs Court or a U.S. District Court would give an accused importer a hearing on whether or not his goods were misbranded even if the Federal Trade Commission does not. See F.T.C. Brief, p. 30, footnote 10.

As the Government well knows, the jurisdiction of the United States Customs Court is confined to cases arising under the customs laws and regulations issued by the United States Customs Service thereunder. The Customs Court has no jurisdiction to review actions of the Federal Trade Commission or members of its staff under the Wool Products Labeling Act. And as we have shown, supra, p. 7-8, Rule 36 is a regulation of the Federal Trade Commission, not the Customs Service, promulgated under the Wool Products Labeling Act, not the Customs laws.

The alternative remedy hypothesized by the Government is equally far-fetched. The suggestion that District Courts throughout the country should now start to try factual issues of wool products labeling which the Commission is charged by statute to determine, and that the courts should try these cases "de novo", without benefit of any administrative record, is offensive to the fundamental principles of administrative law governing the division of functions as between the courts and the federal agencies.

The District Court's jurisdiction to try the merits of the statutory violation presented by the *Precise Imports* case, on which the

Government would rely, was based upon the fact that the statute there involved—the Switchblade Knife Act, 15 U.S.C. § 1242—was a criminal statute of the United States. The United States District Courts have original jurisdiction to try violations of the criminal laws of the United States, 18 U.S.C. § 3231. The District Courts have no jurisdiction, statutory or otherwise, to adjudicate violations of the Wool Products Labeling Act except in those limited instances where the Federal Trade Commission sues for seizure of the goods under § 7(a), or for a preliminary injunction under § 7(b).

It is true that District Courts have inherent jurisdiction to entertain suits for equitable relief from unauthorized administrative action, whether in the form of the traditional writ of mandamus or a suit for declaratory judgment and injunction under § 10 of the Administrative Procedure Act, 5 U.S.C. § 703. But in granting an extraordinary remedy of this sort, the issue for judicial determination is not whether a given shipment of wool products is labeled correctly or not; it is whether in so deciding, the agency exceeded its authority or abused its discretion.[12] Under the judicial proceedings envisioned by Government counsel, there would be no administrative record on which to base such determination no matter how much enforcement experience the Commission had had under Rule 36[13] There would not even be before the court an order entered or reviewed by the Commission itself;[14] the case would arise merely

[12] "It is true that § 10(a) [A.P.A., 5 U.S.C. § 702] states that 'any person suffering legal wrong because of an agency action . . . shall be entitled to judicial review thereof.' However, neither this provision nor any other clause extends the jurisdiction of federal courts to cases not otherwise within their competence." *Gustavsson Contracting Co. v. Floete*, 278 F.2d 912, 914 (2nd Cir., 1960). See also *Almour v. Pace*, 193 F.2d 699 (D.C. Cir., 1951).

[13] Cf. F.T.C. Brief, p. 33. Intervenor's Brief, p. 18.

[14] If any order were provided for under Rule 36 before an importer's goods were barred, it would be reviewable by a U.S. Court of Appeals where

upon the refusal of some anonymous subordinate employee of the Federal Trade Commission to issue a Notice of Release under Rule 36.

The Federal Trade Commission's issuance of an unauthorized regulation depriving an entire industry of its rights under the Wool Products Labeling Act does constitute the kind of arbitrary and unlawful administrative action for which equitable relief has always been available. That is the relief sought by the Complaint herein. But it sounds like a page out of Lewis Carroll when the Government suggests that the availability of equitable relief from unauthorized administrative action under an invalid regulation, validates the regulation itself.

III.

THE IMPORTANT LEGAL ISSUES RAISED BY RULE 36 SHOULD BE RESOLVED IN THIS CLASS ACTION IN WHICH THE LEADING MEMBERS OF THE INDUSTRY ARE REPRESENTED RATHER THAN IN A MULTIPLICITY OF SUITS BROUGHT AT SOME LATER DATE BY SEPARATE IMPORTERS.

The appellees argue that this Court should not decide the validity of Rule 36 now, in this class action brought by the American Importers Association and 35 importers of wool products representing the industry affected. Notwithstanding the fact that the Government, itself, sought and obtained summary judgment on the merits of Rule 36 in the Court below, it now asserts that decision of the issues presented by this appeal would be more appropriate at some later date after the regulation has been enforced, presumably in the course of individual actions filed by importers in the various District Courts where shipments of imported woolens are impounded.

jurisdiction "to affirm, enforce, modify or set aside orders of the Commission shall be exclusive." F.T.C.A. § 5(d), 15 U.S.C. § 45 (d).

The appellees do not explain how this kind of piecemeal and overlapping litigation would aid in the disposition of the legal issues raised by this appeal or promote the cause of justice. They would rely on *Toilet Goods Association v. Gardner*, where the Supreme Court held that the plaintiffs had not exhausted their administrative remedy, and that judicial review was, therefore, premature. 387 U.S. 158, 165, 18 L. Ed.2d 697, 702-3.

Under Rule 36, however, the importers have no administrative remedy. No further enforcement proceedings are necessary in order to bring the full brunt of Rule 36 to bear on the industry. All Shipments of wool products entering the United States will be held up at the port and detained initially for periods varying from three days, at the New York Port, to a matter of weeks at the other ports of entry, App. 46-59. Thereafter shipments may be held up indefinitely at the whim of a subordinate FTC employee[15] without any legal recourse available to the importer to obtain their release.

As shown above, pp. 16-18, the only cause of action available to an importer whose goods are wrongfully detained under Rule 36 is a suit for declaratory judgment that the regulation is invalid for the same reasons stated in the complaint herein. In such a suit, the court would not try the facts of the alleged misbranding that led to the detention of the plaintiff's goods; it would have no jurisdiction to do so. Supra, pp. 15-17. Nor would there be any administrative record to review. The issues for adjudication would be no different than the issues now before this court in this case, i.e., whether the Commission had the authority to promulgate the regulation in the

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[15] Since the burden of proving the absence of misbranding is imposed on the importer and all testing is done at the expense of the importer, there is no practical or legal limit to the number of shipments that Commission employees can detain for testing.

first instance, and whether the importer had been deprived of the right to a hearing on the issue of misbranding.

The only effect of postponing adjudication would be to encourage piecemeal disposition of these issues and to make the litigation more expensive and time-consuming for all concerned. In *Gardner v. Toilet Goods Association*, the Supreme Court quoted with approval the comment of the District Court for the Southern District of New York in this regard:

> "I conclude that in a substantial and practical business sense plaintiffs are threatened with irreparable injury by the obviously intended consequences of the challenged regulations, and that to resort to later piecemeal resolution of the controversy in the context of individual enforcement proceedings would be costly and inefficient, not only for the plaintiffs but as well for the public as represented by the defendants."

387 U.S. 167, 173, 18 L Ed.2d 704, 709.

We can well appreciate why the intervening associations of domestic manufacturers are so anxious to defer judicial review of Rule 36. They have lobbied long and hard for protection against the competition of foreign imports and while they have not been able to persuade Congress, itself, they have (with the aid of influential Congressmen, App. II, Doc. G) succeeded in getting the Federal Trade Commission to do in Rule 36 what Congress has declined to do. Even if Rule 36 is invalid as contrary to the statute, the longer the day of reckoning can be put off, the longer the importers will be handicapped by the delays, uncertainties and additional expenses imposed and the greater the windfall to the domestic mills.

We do not, however, understand why the Federal Trade Commission would not welcome an early decision on the legal questions

raised by their new regulation. We cannot understand why they should resist pre-enforcement review and adjudication of these fundamental legal issues on this appeal. As far as the Commission is concerned, it would seem pointless to go to the trouble and expense of setting up the machinery involved in the enforcement of Rule 36 only to have it dismantled at a later date if the regulation is declared invalid. As the Supreme Court observed in *Abbott Laboratories v. Gardner*, "a pre-enforcement challenge by nearly all [members of the industry] is calculated to speed enforcement. If the Government prevails, a large part of the industry is bound by the decree; if the Government loses, it can more quickly revise its regulation." 387 U.S. 136, 155, 18 L. Ed.2d 681, 695.

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January 2, 1969

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,505

TEXTILE AND APPAREL GROUP,
AMERICAN IMPORTERS ASSOCIATION, et al.,
Appellants,

v.

FEDERAL TRADE COMMISSION, et al.,
Appellees.

BRIEF OF APPELLEES, NATIONAL KNITTED OUTERWEAR ASSOCIATION, ET AL.

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December 24, 1968

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BRIEF OF APPELLEES, NATIONAL KNITTED OUTERWEAR ASSOCIATION, ET AL.

This brief is submitted on behalf of three appellees who were allowed to intervene as party defendants in the District Court--National Knitted Outerwear Association, National Association of Wool Manufacturers, and Northern Textile Association. These appellees, following permission to intervene (App. 65), filed not only an answer to the complaint (App. 76) but also a motion to dismiss that complaint on jurisdictional grounds (App. 119). The motion to dismiss was granted by the District Court (App. 121), along with the Federal Trade Commission's motion for summary judgment, and the granting of that motion to dismiss forms one aspect of the appeal now before this Court.

The briefs of the other parties to this appeal have properly stated the nature of this case and the issues raised before this Court. There are no factual disputes or differences. This brief will therefore be confined to an analysis of the legal propositions involved, an analysis which the appellees believe leads inevitably to the conclusion that the judgment below should be affirmed.

SUMMARY OF ARGUMENT

1. The Federal Trade Commission had clear authority under Section 6(a) of the Wool Products Labeling Act to promulgate Rule 36. Section 6(a) gives two basic types of power to the Commission: (A) Except as otherwise specifically provided, the Commission is to enforce the Wool Products Labeling Act through the powers and duties provided for in the Federal Trade Commission Act; and (B) The Commission is authorized to make rules and regulations relating to the disclosure of information, to cause inspections and tests of wool products, and to act in cooperation with other agencies of the Government.

The first type of delegated power, wherein the techniques of the Federal Trade Commission Act are to be employed, relates to those areas of enforcement where the reach of the Wool Products Labeling Act coincides with that of the Federal Trade Commission Act--i.e., those areas where the products or practices have somehow entered

"into commerce" with the states or territories of the United States.

But the Federal Trade Commission Act has no provision barring the importation of misbranded products or requiring the proper labeling of imported products. That Act, in other words, has no counterpart of Section 8 of the Wool Products Labeling Act. When acting with respect to this area of enforcement, an area that reflects the broad foreign commerce power of the Government, the Commission must rely upon the other specific powers granted to it by Section 6(a)--the powers to make rules for disclosure of information, to cause inspections and tests to be made, and to act in cooperation with other agencies. When drawing upon these specific powers in treating with foreign imports, the Commission is not bound by or restricted by the procedures set forth in the Federal Trade Commission Act. The Commission could thus promulgate Rule 36 without regard to the provisions of that Act respecting full adversary-type proceedings. And it did so in full cooperation with the Bureau of Customs, an agency charged by law (19 U.S.C. §1499) with testing imports to insure compliance with such legislation as the Wool Products Labeling Act. Cf. 21 U.S.C. §381.

2. Because Rule 36 reflects the plenary foreign commerce power of the Government and because it is derived from those portions of Section 6(a) of the Wool Products Labeling Act that are unrestricted by the Federal Trade Commission Act, it is neither relevant nor

fatal that Rule 36 assertedly (a) fails to provide for a full administrative hearing on the misbranding issue, or (b) converts the cease-and-desist powers under the Federal Trade Commission Act into a licensing power.

By its very nature, the power of the Government to control and exclude imports implies some sort of licensing or testing system. And the repeated decisions of the Supreme Court have made plain that an importer has no enforceable right to a full administrative hearing as to whether the prescribed conditions for a product's admission into the country have been met. See Buttfield v. Stranahan, 192 U.S. 470 (1904); Board of Trustees v. United States, 289 U.S. 48, 57 (1933); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); see also Sugarman v. Forbraqd, 267 F.Supp. 816, 824-825 (N.D. Cal., 1967). An importer injured by the action of the Commission or the Bureau of Customs in testing or excluding a wool import may be entitled to some form of relief under the Administrative Procedure Act or before the Customs Court. But at the point of actual importation, there is no constitutional or enforceable right to an adversary-type hearing on the question of mislabeling.

Recognition of the plenary foreign commerce power that underlies Rule 36 suffices to dispose of all the questions raised by the appellants on this appeal.

3. Quite apart from the merits of this appeal, a serious question remains whether pre-enforcement judicial review may be

had at this juncture of an administrative regulation like Rule 36. That regulation has not yet been imposed on any appellant; it has not denied any rights of any appellant or fixed any legal relationship with respect to any imported wool product. It cannot be said how Rule 36 will affect any of the appellants. Will notices of release be refused? Will bonds be posted? Will testing be required? Will there be reason to suspect misbranding? What will be the basis of any determination to require testing or to bar an importation?

The prematurity of this effort to secure a broad declaration as to the validity of Rule 36 is demonstrated by the recent Food and Drug trilogy in the Supreme Court. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967). A comparison between Rule 36 and the food and drug regulation involved in the second of those three cases (387 U.S. 158) reveals that Rule 36 is no more ripe for review than the food and drug regulation there involved; in both instances, the regulation is not a self-executing directive to an entire industry but rather envisages discretionary action by administrative agents in the context of particular circumstances that have not yet occurred. The ruling of the Supreme Court that such a regulation is not yet ripe for judicial review (387 U.S. 158) is fully applicable to this case.

4. While the appellants have not renewed the contention on this appeal, the action of the District Court in dismissing their claim

that Rule 36 violated Article III of GATT (General Agreement on Tariff and Trades) was plainly correct. Article III provides that each of the contracting nations shall accord products imported from another contracting nation treatment no less favorable than that accorded like products of national origin. Article XXIII of GATT provides that any violation of such a commitment shall be a subject of negotiation and arbitration as between the contracting nations. No provision is made in GATT for private rights enforceable in the domestic courts of any nation.

In those circumstances, the decisions of the Supreme Court clearly dictate that a domestic court decline to adjudicate or entertain a claim by a private party that Article III of GATT has been violated. United States v. Ferreira, 13 How. 40, 47-48 (1851); Chae Chan Ping v. United States, 130 U.S. 581 (1889); Whitney v. Robertson, 124 U.S. 190 (1888). The District Court had no alternative but to dismiss the second count of the complaint.

ARGUMENT

1. The Federal Trade Commission has statutory authority to promulgate Rule 36.

As stated by the Commission in promulgating Rule 36, "Such action is taken pursuant to the authority given to the Federal Trade Commission under paragraph (a) of Section 6 of the Wool Products Labeling Act of 1939 (54 Stat. 1131; 15 U.S.C. 68d)." App. 37. The statutory pattern fully confirms the accuracy of that statement.

Section 6(a) of that Act commences with the provision that, "Except as otherwise specifically provided herein," the Act shall be enforced by the Commission "under rules, regulations, and procedures provided for in the Federal Trade Commission Act." And Section 6(a) continues with an authorization and direction to the Commission "to prevent any person from violating" the Act "in the same manner, by the same means, and with the same jurisdiction, powers and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of" the Wool Products Labeling Act. Any person violating this Act "shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act."

The appellants stop their reading of Section 6(a) at this point. They assume that the foregoing provisions constitute the sole jurisdictional basis for promulgating any rule or regulation under the

Wool Products Labeling Act, a jurisdictional basis which confines the Commission to the same jurisdiction and powers of enforcement as provided in the Federal Trade Commission Act. That assumption is not only misplaced but is directly contradicted by the succeeding portions of Section 6(a).

A proper reading of these opening provisions of Section 6(a) necessitates an understanding that much of the Wool Products Labeling Act, like the Federal Trade Commission Act, is directed toward the introduction "into commerce" of misbranded products. Section 2(h) of the Wool Products Labeling Act, 15 U.S.C. §68(h), defines "commerce" in the usual broad fashion, emphasizing that it means commerce between or with the states and territories of the United States. And Section 3, 15 U.S.C. §68a, proscribes the introduction "into commerce" or the sale or distribution "in commerce" of misbranded wool products. Such introduction or sale is defined by Section 3 as "an unfair method of competition, and an unfair and deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act."

Because of this incorporation of the "in commerce" proscriptions of the Wool Products Labeling Act into the principles of the Federal Trade Commission Act, it is both practical and meaningful to authorize the Commission to utilize the jurisdictional and enforcement powers of the Federal Trade Commission Act in administering the "in commerce" provisions of the Wool Products Labeling

Act. The Federal Trade Commission Act is itself directed exclusively toward the prevention of unfair methods of competition "in commerce" and unfair or deceptive acts or practices "in commerce." 15 U.S.C. §45(a)(1). And to the extent that these two Acts deal with practices relating to trade or commerce with one or more states or territories of the United States, even where the trade or commerce originates in a foreign land, Congress has directed that the Commission's powers of enforcement be identical under both Acts.

The critical fact that emerges from any comparison of the two Acts, however, is that the Federal Trade Commission Act does not purport to deal with testing or exclusion of foreign products at the point of importation. At the most, that Act deals with misbranding or deceptive practices concerning foreign products only after they have in some manner entered "into commerce" with the states or territories of the United States. See, e.g., W.M.R. Watch Case Corp. v. Federal Trade Commission, 120 U.S. App.D.C. 20, 343 F.2d 302 (1965); and see opinion of the Commission in R.H.Macy & Co., Inc., Docket No. 8650, reprinted at App. 95. At no point does the Act proscribe the importation of misbranded products or establish testing standards for products being imported.

In contrast, Section 8 of the Wool Products Labeling Act, 15 U.S.C. §68f, provides for the exclusion from commerce, at the point of importation, of foreign wool products that are misbranded.

Labeling requirements for such imports are there established and various penalties are provided for those domestic consignees who falsify or omit pertinent information from their invoices. Condemnation, injunctive and criminal remedies are also provided. See Sections 7 and 10, 15 U.S.C. §§68e, 68h.

It is in light of the importation standards of Section 8 that it becomes pertinent to go forward with a reading of the succeeding portions of Section 6(a), the portions which the appellants would submerge into insignificance. Those are the portions to which the Commission specifically pointed in its promulgation of Rule 36 (App. 37) and those are the portions that explain why the Federal Trade Commission Act limitations and provisions become irrelevant in this importation context.

More specifically, the third paragraph of Section 6(a) authorizes and directs the Commission "to make rules and regulations for the manner and form of disclosing information required by" the Act--including Section 8--and "to make such further rules and regulations under and in pursuance of the terms of said sections as may be necessary and proper for administration and enforcement." The fourth paragraph of Section 6(a) then authorizes the Commission "to cause inspections, analyses, tests, and examinations to be made of any wool products subject to" Section 8, and "to cooperate with any department or agency of the Government" in the execution of these powers.

In other words, the Commission is expressly authorized to establish rules for disclosing information as to imports, to cause tests to be made of imports and to act in cooperation with other agencies of the Government in so doing--to wit, the Secretary of the Treasury and the Bureau of Customs. And these specific authorizations, which find no counterparts in the Federal Trade Commission Act, must be deemed to be within the scope of the opening clause of Section 6(a)--"Except as otherwise specifically provided herein." In short, the Federal Trade Commission Act is not the source or the limitation of the Commission's power to enforce Section 8 by way of inspection or testing of imports pursuant to prescribed standards.

To put the matter somewhat differently, the Commission is enjoined by Section 6(a) to follow the applicable terms and procedures of the Federal Trade Commission Act wherever pertinent to the administration and enforcement of the Wool Products Labeling Act. But when the Commission is dealing with "rules and regulations for the manner and form of disclosing information" as required by Section 8, or when it seeks "to cause inspections, analyses, tests, and examination" of foreign wool products at the point of importation, there is no limitation in terms of the Federal Trade Commission Act. In those respects, the Commission is authorized to proceed in accordance with its own best judgment and in cooperation with Customs authorities.

As the brief of the Federal Trade Commission amply demonstrates, the Commission has promulgated Rule 36 with the foregoing statutory authorizations in mind and against a background of a Congressional recognition that the Bureau of Customs was to aid in the enforcement of Section 8 of the Wool Products Labeling Act. Congress in 1930 directed the Customs Service to examine and test imports to insure compliance with the laws of the United States. 19 U.S.C. §1499. And when the Wool Products Labeling Act became law in 1939, Section 8 and other sections of that Act became part of the laws entrusted to the Customs Service for compliance purposes. The Customs authorities recognized that duty in their promulgation of a regulation in 1941 dealing with examination of foreign wool products. 6 Fed. Reg. 2480. The Commission's adoption of Rule 36 is simply a manifestation of the Congressional authorization of cooperation between the Commission and Customs with respect to testing such imports to insure compliance with the Wool Products Labeling Act.

In executing that type of cooperation with respect to imports, the Commission is no more bound by the procedures and the enforcement techniques of the Federal Trade Commission Act than is the Bureau of Customs. Section 6(a) has explicitly lent the expertise of the Commission in evaluating wool imports to the effectuation of the Congressional policy of barring the importation of mislabeled wood products from abroad. In a similar fashion, Congress has loaned

the expertise of the Food and Drug Administration to the examination at ports of entry, in cooperation with Customs authorities, of foods, drugs, devices and cosmetics being imported or offered for import into the United States. 21 U.S.C. §381; see Sugarman v. Forbragd, 267 F. Supp. 817 (N.D. Cal., 1967).

Thus a plain and proper reading of Section 6(a) makes obvious the power of the Commission to promulgate Rule 36 as an aid in implementing the unquestioned power of Congress to bar misbranded and mislabeled wool products from entering this country. That power is concentrated not on goods that are "in commerce" within the country but on goods that are seeking entry to the United States at the various ports of entry. And because the power is centered on goods prior to their becoming a part of domestic commerce, the procedures and the enforcement techniques are necessarily derived from broader sources than those described in such purely domestic legislation as the Federal Trade Commission Act. That fact is critical in this appeal; it makes plain the inevitablity and the correctness of the decision of the District Court.

2. Rule 36 is not defective in its failure to provide for a full adversary hearing on the issue of misbranding or in its establishment of a so-called licensing system.

The foregoing statutory analysis also provides the answer to appellants' contention that Rule 36 somehow constitutes a perversion of the Commission's rule-making powers in that (1) it fails to provide for a full hearing on the issue of misbranding as specified by §5(b) of the Federal Trade Commission Act, and (2) it seeks to convert the cease-and-desist powers under the Federal Trade Commission Act into a licensing power that Congress has not seen fit to confer.

Once it is recognized that Section 6(a) of the Wool Products Labeling Act authorizes the Commission to promulgate regulations and to provide for testing, in conjunction with the Bureau of Customs, with respect to foreign wool products at the point of importation, the contentions of the appellants lose their force. When dealing with the subject of foreign imports, as the Commission was here doing on delegation from Congress, the United States Government is dealing with what in a sense may be called a licensing system. So plenary is the power of Congress with respect to the exclusion of merchandise brought from foreign countries that Congress may in its discretion authorize the admission of imports on such conditions or in accordance with such "licensing" requirements as are deemed appropriate. Buttfield v. Stranahan, 192 U.S. 470, 492-493 (1904).

The objection that the Commission has established a licensing system as to wool imports can carry no weight, therefore, as long as the Commission has acted pursuant to Congressional authorization--as it has in this instance.

Equally fruitless is the contention that the Commission erred in failing to provide in Rule 36 for a full-scale adversary proceeding on the issue of misbranding, augmented by judicial review of the administrative determination. Chairman Dixon of the Commission recognized, at the time Rule 36 was promulgated, that the true basis for the Commission's action lay in the foreign commerce power of the Government, citing Buttfield v. Stranahan, 192 U.S. 470 (1904), and Sugarman v. Forbragd, 267 F.Supp. 817 (N.D. Cal., 1967), in support of the procedural and enforcement policies announced by Rule 36. See App. 81-84; 32 Fed. Reg. 15183. An appreciation of the scope of the constitutional power here asserted demonstrates that Rule 36 cannot be considered deficient in its failure to prescribe a full administrative hearing as to the misbranded character of an import.

The Supreme Court's decision in Buttfield v. Stranahan, supra, which in a real sense underlies Rule 36, reveals the broad and plenary power of Congress to deal with imports as it sees fit. In that case, involving an administrative refusal to admit into the United States a shipment of tea found by a board of general

appraisers to be below specified standards, the Court pointed out (192 U.S. at 493):

> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised.

Moreover, the complainants in the Buttfield case -- like the appellants in this case -- urged that there was a denial of due process of law in failing to accord them a hearing before the general appraisers upon re-examination and rejection of the tea. The Court flatly rejected this contention, stating (192 U.S. at 497):

> The provisions in respect to the fixing of standards and the examination of samples by government experts was for the purpose of determining whether the conditions existed which conferred the right to import, and they therefore in no just sense concerned a taking of property. This latter question was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of the agents of the government, upon whom power on the subject was conferred.

It follows, then, that the instant appellants can assert no property interest at this juncture that justifies judicial protection. Nor can they protest the lack of a provision in Rule 36 for a formal notice and hearing in connection with the execution of its provisions. At the point of importation, the broad plenary power of the Government admits of no such requirements.

Subsequent opinions of the Supreme Court have restated and even strengthened the Buttfield principles. Thus in Board of Trustees v. United States, 289 U.S. 48, 57 (1933), the Court declared:

> The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States . . . . If the Congress saw fit to lay an embargo or to prohibit altogether the importation of specified articles, as the Congress may, . . . no State by virtue of any interest of its own would be entitled to override the restriction.

And in his concurring opinion in Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 at 167 (1951), Mr. Justice Frankfurter noted that "The importation of goods is a privilege which, if Congress clearly so directs, may . . . be conditioned on ex parte findings."

In sum, in the words of Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895(1961),

> Where it has been possible to characterize that private interest . . . as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required.

See also Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 434 (1932); Brolan v. United States, 236 U.S. 216, 218-219 (1915); The Abby Dodge v. United States, 223 U.S. 166, 176-177 (1912); Weber v. Freed, 239 U.S. 325,329 (1915); and see Sugarman v. Forbragd, 267 F. Supp. 817, 824-825 (N.D. Cal., 1967).

The unlimited nature of the Congressional power over foreign imports makes plain that a formal notice and hearing are not

constitutionally or otherwise required with respect to the determination whether articles offered for import are in compliance with the laws of the United States. It may well be that if an appellant were in fact injured by the action of the Commission or the Customs authorities in barring an importation he would have available some form of relief under the Administrative Procedure Act or before the Customs Court. But the mere failure of Rule 36 itself to provide a full-scale adversary hearing at the time of testing the importation cannot be considered significant, let alone fatal. Since Rule 36 is an administrative expression of the plenary governmental power over foreign imports, a full administrative hearing is not required.

3. A serious problem is raised as to whether appellants have presented a justiciable controversy at this juncture.

Quite apart from the merits of this appeal, a problem remains as to the justiciable nature of this controversy. As recognized by the District Court's grant of the appellees' motion to dismiss, that problem is whether pre-enforcement judicial review may be had of an administrative regulation like Rule 36.

Paragraph 19 of the complaint asserts that a justiciable controversy exists by virtue of (1) a dispute as to the authority of the Commission to promulgate Rule 36, (2) an alleged violation of procedural and due process safeguards, and (3) a "pervasive and injurious" effect on the business of the appellants, who must make "immediate and significant" changes in the conduct

of their business to avoid severe penalties for noncompliance with Rule 36. The asserted injuries to appellants' business and commerce are set out more fully in paragraph 14 of the complaint, injuries that are said to justify an immediate judicial review of virtually all aspects of Rule 36. App. 12-13.

But the difficulty faced by these appellants is that Rule 36 embodies no final or injurious administrative action against these appellants and, indeed, the actual and ultimate impact of Rule 36 on these appellants cannot now be assessed or predicted. It has long been axiomatic that "administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 112-113 (1948); and see United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299 (1927). Yet Rule 36 has not imposed on these appellants any obligation, denied them any right or fixed any legal relationship with respect to any imported wool products. Just how Rule 36 would apply to any of these appellants has not been established; nor can it be said which of the various provisions of Rule 36 will be applied to the plaintiffs as to future imports. Will notices of release be refused? Will bonds be posted? Will testing be required? Will there be any reason to suspect misbranding? What will be the basis of any determination to require testing or to bar an importa-

or abridge any power or facility; . . . does not subject the [appellants] to any liability, civil or criminal; . . . does not change the [appellants'] existing or future status or condition; . . . does not determine any right or obligation . . . It was merely preparation for possible action in some proceeding which may be instituted in the future . . . if and when occasion for action shall arise." Rule 36, in short, is the equivalent of a new piece of legislation that has not yet been executed or imposed upon the complaining person or importer.

Indeed, Rule 36 is precisely the type of administrative regulation that was recently found non-reviewable at the pre-enforcement stage in the Food and Drug trilogy. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967). While finding the regulations in those cases to be "final agnecy action" within the meaning of the Administrative Procedure Act, the Supreme Court formulated a ripeness-for-review test in terms of an evaluation "both of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott, 387 U.S. at 149. Application of that test in the second case of the trilogy, Toilet Goods Ass'n v. Gardner, 387 U.S. 158, led to the conclusion that the regulation in question was not presently ripe for adjudication.

tion?

The appellants, in other words, are seeking no more than advisory opinion -- virtually simultaneous with the first effective date of Rule 36 and before it could be put into operation against these appellants -- as to the statutory and constitutional implications of Rule 36. The appellants do not show that they have sought to import any wool products whereby any or all provisions of Rule 36 would be brought into operation; they have not been denied the right to import products without compliance with Rule 36; nor have they suffered any injury as a result of having complied with that Rule. At most, they merely fear what the consequences of compliance will be should some future shipment be suspected of being misbranded or falsely labeled. For aught that appears in the complaint or in fact, these appellants may be able to secure prompt preentry notices of release, or prompt notices of release issued upon examination of their Forms 36A, pursuant to §300.36(c), with none of the feared delays or changes in business practices or expensive testing procedures.

Rule 36, like the Interstate Commerce Commission investigative order involved in United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, 309-310 (1927), "does not command the [appellants] to do, or to refrain from doing, anything; . . . does not grant or withhold any authority, privilege or license; . . . does not extend

It is instructive as well as decisive of this case to compare the Toilet Goods regulation held to be unreviewable with that portion of Rule 36 to which appellants make their most serious complaint, that portion dealing with the certification and testing of imported wool products:

Toilet Goods regulation, 26 Fed. Reg. 679

"When it appears to the Commissioner that a person has . . . Refused to permit duly authorized employees of the Food and Drug Administration free access to all manufacturing facilities, processes, and formulae involved in the manufacture of color additives . . . he may immediately suspend certification service to such person and may continue such suspension until adequate corrective action has been taken."

Rule 36

"Where the Commission has reason to believe that any wool products subject to this section may be misbranded, it may determine not to issue a notice of release but to require that such wool products be held for certification or testing . . . If the certification or test results show the goods to be misbranded, the Commission will not issue a notice of release until after the goods have been correctly labeled."

In both regulations, the administrative agency may under certain circumstances, based upon what appears to be the case or on what the agency believes to be the case, order an inspection of the premises or of the products. And in both regulations, the agency may then take further action--whether by way of suspension of certification service or by way of refusal to issue a notice of release. It was in that context that the Court concluded, 387 U.S. at 163, that "At this juncture we have no idea whether or when such an in-

spection will be ordered and what reasons the Commissioner will give to justify his order."

Moreover, the Court in the Toilet Goods case emphasized that the regulation there involved was not a self-operative one that immediately affected an entire industry or that immediately imposed heavy sanctions for disobedience. 387 U.S. at 164-165. It was a regulation quite unlike the Abbott regulation, which provided that the drug industry should forthwith label their drugs with the established names thereof as well as the proprietary names or designations. 387 U.S. at 138. The Toilet Goods regulation, in other words, was not a directive but a warning that certain administrative action might take place when and if the agency determined that good reasons existed. And the Supreme Court held that judicial review of the statutory authority for such a regulation had to await the exercise of the agency's discretion, when the reasons could be evaluated and when actual damage to the complainants would ensue. That conclusion necessarily follows in this case. It is premature to review the statutory propriety of Rule 36 unless and until the event occurs as to which the appellants basically complain--i.e., Commission action requiring testing based on its belief that a given import may be misbranded. Unless that event occurs, appellants will be able to import their products with a minimum of delay and expense and to obtain the necessary notices of release, or pre-entry

notices, without the burden of performing tests.

Here, then, the appellants are premature in their assault on Rule 36. Those provisions have not yet been applied to them in the context of a present case or controversy. The appellants are merely seeking an advisory opinion as to the validity of Rule 36 should it be applied to them in any one of a variety of ways at some future date as to some future shipment of wool products. They would have this Court condemn at one swoop all of the various enforcement measures enumerated in Rule 36, measures that are exercisable only in relation to specific situations that may make some provisions of Rule 36 applicable and others inapplicable.

Under established judicial doctrine the appellants have no standing to press such blunderbuss claims at this point. "A hypothetical threat is not enough." United Public Workers v. Mitchell, 330 U.S. 75, 90 (1947).

4. The dismissal of the count seeking an adjudication of the alleged violation of GATT was clearly correct.

The second count of appellants' complaint asserted that the Commission, by the adoption of Rule 36, acted in violation of Article III of the General Agreement on Tariff and Trades, an executive agreement commonly called GATT. App. 13-14. Article III of GATT provides, in essence, that any contracting party shall accord products imported from another contracting party "treatment

no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

On a motion offered by the instant appellees, the District Court dismissed this second count of complaint. The appellants do not renew this GATT point on this appeal nor challenge the ruling of the District Court in this respect. That ruling was plainly correct.

No federal or state court has jurisdiction to adjudicate the asserted violation of GATT or to render a declaratory judgment that Rule 36 breaks the commitment of the United States in Article III of GATT. That executive agreement, like a treaty, is a compact among the United States and 74 foreign nations. All of the commitments contained in GATT are commitments as between and among the sovereign nations signatory to the agreement, known as "contracting parties." And any violations, nullifications or impairments of those commitments -- including violations of Article III -- can be remedied only in accordance with Article XXII of GATT, 61 Stat. A64. Article XXIII specifically provides that if a contracting party considers that a provision of GATT has been nullified it may "make written representations or proposals to the other contracting party or parties which it considers to be concerned"; if no satisfactory adjustment

is reached within a reasonable time, the matter may be referred to the other contracting parties, who "shall make appropriate recommendations to the contracting parties . . . or give a ruling on the matter, as appropriate."

Thus GATT contemplates that violations shall be the subject of negotiation and settlement as between the sovereign contracting parties. There is not the slightest suggestion that any private individual or corporation or association has any rights under GATT that can be enforced in the domestic courts of any of the contracting nations. GATT is a classic illustration of an international obligation that falls completely outside the jurisdiction of domestic tribunals with respect to violation or enforcement. The Supreme Court, more than a century ago, established the principle that the judicial tribunals of this country have no jurisdiction over, or concern with, violations of international agreements that do not expressly create enforceable rights for private citizens. United States v. Ferreira, 13 How. 40, 47-48 (1851). That principle has never been altered. See Chae Chan Ping v. United States, 130 U.S. 581 (1889); Whitney v. Robertson, 124 U.S. 190 (1888).

Since the rights or benefits under Article III of GATT are assertable only by other signatory nations in accordance with Article XXIII, the foregoing principle long followed by the Supreme Court dictates the dismissal of the second count of the complaint.

The District Court acted rightly in dismissing that count.

CONCLUSION

For these various reasons, the judgment of the District Court dismissing the complaint should be affirmed.

Respectfully submitted,

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BRIEF FOR THE FEDERAL TRADE COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,505

TEXTILE AND APPAREL GROUP, AMERICAN IMPORTERS ASSOCIATION, et al.,

Appellants,

v.

FEDERAL TRADE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW*

Rule 36, issued by the Federal Trade Commission under the Wool Products Labeling Act, authorizes the Federal Trade Commission to cooperate with the Bureau of Customs in withholding Customs release for imported wool products -- or permitting release under bond -- until the products have been tested for compliance with the Act. The issues presented are:

1. Whether Rule 36 is a valid exercise of the Commission's rule-making authority under Section 6 of the Wool Products Labeling Act.

2. Whether Rule 36 is unconstitutional because i) it authorizes withholding of Customs release before any hearing is held, or ii) the Rule itself contains no provision for any subsequent hearing or judicial review.

3. Whether the issues presented here are ripe for judicial resolution.

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* This appeal has previously been before the Court on appellant's motion for an injunction pending appeal.

I N D E X

CITATIONS

Cases:

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No. 22,505

TEXTILE AND APPAREL GROUP, AMERICAN IMPORTERS ASSOCIATION, et al.,

Appellants,

v.

FEDERAL TRADE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATEMENT OF THE CASE

Appellants are importers of wool products and an importers' trade association. They brought this action seeking to restrain the Federal Trade Commission from enforcing Rule 36, 16 C.F.R. 300.36, promulgated by the Commission under the Wool Products Labeling Act of 1939, 15 U.S.C. 68 et seq. (App. 1-21). Rule 36 took effect on February 12, 1968. Four days later, Judge Hart granted a preliminary injunction against its enforcement. (App. 71-75). However, on November 4, 1968, Judge Corcoran granted the Government's motion for summary judgment, as well as the motion to dismiss of the intervenors (a trade association of domestic manufacturers of wool products) and the Government. (App. 121). This appeal followed.

Section 3 of the Wool Products Labeling Act declares generally that the sale or distribution of misbranded wool products is unlawful and is an unfair method of competition and an unfair and deceptive practice under the Federal Trade Commission Act. Section 8 of the Wool Products Labeling Act provides that all wool products imported into the United States "shall be stamped, tagged, labeled, or otherwise identified" in accordance with the Act. 15 U.S.C. 68f. In order to enforce the Act as to domestic wool products, the Commission utilizes the familiar cease-and-desist procedure set forth in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Under this procedure, the distributor of a misbranded product does not come under constraint until there has been an administrative hearing, and a cease-and-desist order subject to judicial review. Alternatively, the Commission may bring a suit for condemnation of the wool products, or for a preliminary injunction pending the outcome of the administrative cease-and-desist proceedings. 15 U.S.C. 68e. In either event, the distributor of the mislabeled domestic wool product gets a hearing before being subject to constraint.

The question here is whether the Commission has authority to adopt a different procedure with respect to imports. Rule 36 provides that imported wool products shall be retained in Customs custody unless the Commission has issued a notice of release or the importer has furnished a bond, and the Commission may refuse to issue a notice of release if its tests

indicate that the product is mislabeled. The appellant importers contend that this procedure is beyond the Commission's statutory authority, because under it the Commission may prevent wool products from coming into the country before a hearing has been held.

1. Rule 36.

Rule 36 is set forth at 16 C.F.R. 300.36, and is reproduced in the Appendix (at pp. 26-32). The Rule applies to any person who imports wool products subject to a requirement of formal entry through Customs. The importer must file with the Bureau of Customs a form setting forth certain information, including the fiber content of the goods. The Bureau of Customs forwards this information to the Federal Trade Commission. Rule 36(a). The importer may obtain immediate release of the goods by filing a bond in a form acceptable to the Commissioner of Customs, conditioned upon redelivery to Customs custody if the Commission determines not to issue the notice of release. Rule 36(b). Failure to redeliver subjects the importer to liquidated damages under the standard Bureau of Customs bond, utilized under the Rule. Rule 36(b), (f). If the importer does not furnish a bond, he can obtain release of the goods from Customs custody only if the Commission issues a notice of release.

A notice of release may be obtained prior to entry of the goods. This "pre-entry notice of release" may be obtained by submitting a request "accompanied by such information or data, including manufacturers' records, laboratory analyses, foreign government certifications, and certifications of government designated

trade associations or other bodies, as will show no reason to believe that [the imported products] may be misbranded." Rule 36(d). The request may also show whether the products are of the same type and from the same manufacturer as products previously released. Ibid. The request must be filed at least seven working days before the entry. If this is done, the Commission must act before the entry is made, either issuing a notice of release, informing the importer that the goods will have to be tested, or requesting more information. Ibid.

If a pre-entry notice of release is not obtained, application for the notice of release is made when the goods arrive at the port of entry. Rule 36(c). If a Commission inspector is on duty at that port, he must act within three days; if no inspector is on duty at the port, the Commission must act within three days of receiving the request for release. Ibid. Failure by the Commission to act within the required time is equivalent to issuance of the notice of release. Ibid.

Upon application for a notice of release, the Commission may determine that testing is required. Rule 36(e). The Commission may choose to accept a certification as to fiber content by a laboratory included in the Commission's list of approved laboratories, or it may perform its own tests. Ibid. In either case, if the tests reveal that the goods are misbranded, the Commission will not issue a notice of release until the goods have been correctly relabeled. Ibid. All testing is done at the expense of the importer. Ibid.

2. Reasons for Adoption of Rule 36.

In its opinion accompanying issuance of the Rule (App. 32-38), the Commission explained that the Rule was "intended to achieve substantial equality in enforcement as between domestically produced products and imported products and designed to offer substantially equal protection to the public with reference to all types of wool products." (App. 33). The Commission explained that domestic manufacturers are required by the Act and regulations "to keep extensive and detailed manufacturing records disclosing the fiber content of products manufactured by them * * *. In many instances such records are records which would not ordinarily be kept in the regular course of business and are maintained at substantial expense * * *." (App. 33). See 15 U.S.C. 68d(b), 16 C.F.R. 300.31. "Domestic manufacturers and dealers are also subject to inspections at their places of business by investigators of the Commission's Bureau of Textiles and Furs." (App. 33). The records which domestic manufacturers keep enable the Commission to prevent many violations of the Act with respect to domestic products before they occur:

> Through such records, it is possible to establish a line of continuity from the finished products back to the origin of the raw fibers. This record keeping plus periodic inspections by Commission personnel provides an effective means of policing the labeling of domestically produced wool products to prevent incipient violations of the statute.

In the Matter of R.H. Macy &Co., Inc. and Sportempos, Inc. (App. 97).[1/]

By contrast, the Commission pointed out, "[f]oreign manufacturers and producers are not subject to the [record-keeping and inspection] requirements and are not subject to the jurisdiction of the Federal Trade Commission. Therefore, the Commission has found it necessary to develop a different program intended to achieve substantial equality in enforcement as between domestically produced products and imported products and designed to offer substantially equal protection to the public with reference to all types of wool products." (App. 33).

The inadequacy of cease-and-desist proceedings with respect to imports had been explained by Chairman Dixon to a House Appropriations Subcommittee:

> Now in recent years, big buyers and big sellers, big department stores import large quantities of woolen knit sweaters. Primarily the problem came in the form of a sweater that could come in labeled "all wool" or "virgin wool" or "cashmere" if they wished to do it, and apparently they were coming from certain sections of the world.

1/ The R.H. Macy case was a proceeding against a domestic retailer of allegedly mislabeled imported sweaters. In an opinion issued shortly after the proposed Rule 36 was issued, the Commission explained some of its problems in enforcing the Wool Products Labeling Act against imports. See App. 95-99. In a separate statement made in response to Commissioner Elman's dissent from the promulgation of Rule 36, Chairman Dixon stated (App. 85):

(Footnote cont'd)

> Their competitors would buy them, have them tested and complain to the Federal Trade Commission. We tried to resolve it by a proceeding. That wasn't a good enough answer because it was after the fact and literally hundreds of thousands of these items might get into commerce and be sold before you could do anything about it. 2/

After Rule 36 was adopted, Congress passed an appropriation for its enforcement. (App. Vol. II, Document G, p. 7).[3/]

3. Enforcement of Rule 36.

The Commission's opinion accompanying the issuance of Rule 36 states its intention with respect to enforcement of the Rule:

> Every effort has been made to minimize delays. At those points of entry where a sufficiently large number of wool imports arrive, the Commission will place inspectors on duty so that they may determine upon arrival whether to release a shipment or require its testing or certification.

1/ (Footnote cont'd)

> In substance, domestic manufacturers have been required to maintain records which establish a line of continuity from the raw product to the finished product, showing the supplier of the raw material, the fabric content of the raw material, and detailed manufacturing and blend records.

A statement of the purpose of the record-keeping requirement imposed on domestic manufacturers is also contained in the record-keeping regulation. 16 C.F.R. 300.31(b).

2/ Hearings before a Subcommittee of the House Committee on Appropriations, on Independent Offices and Department of Housing and Urban Development Appropriations, 1968, 90th Cong., 1st Sess., at 944. (App. Vol. II, Document G, Exh. 2).

3/ The appropriation bill was approved October 4, 1968. Public Law 90-550, 82 Stat. 937.

(App. 36). Furthermore, the Commission stated that the testing procedure is "not intended to be applicable to products which are not indicated to be subject to widespread misbranding." (App. 34). Finally, even in those cases where the goods are required to be tested, the Commission stated its intention to pass the goods through Customs under the form of bond provided in the Rule -- which is the form of bond presently furnished by importers under standard importation procedures. (App. 35).

Because of the preliminary injunction entered in this action, there have been only five days of actual enforcement experience under Rule 36 (February 12-16, 1968). During that time, the Commission's Bureau of Textiles and Furs had two men stationed at the Customs House in downtown Manhattan and two men at the Kennedy International Airport. (App. 107). During the five days in which the Rule was in effect, approximately 700 shipments were processed at New York. In general, the processing consisted of ascertaining that the required papers were properly and completely filled out, and determining whether or not a notice of release should be issued at that time or testing required. Most entries were fully processed in a matter of a few minutes, while none required longer than 30 minutes to process. (App. 107-8). 4/

4/ The Port of New York is the principal entry port for wool products; approximately 60% of imported wool products come through it. (App. 104). During the five-day period in February, 1968, when Rule 36 was in effect, approximately 700 shipments came in through New York, while only 150 came in through other ports. (App. 103-4).

With regard to those products for which it is determined that testing is required, the Assistant Director of the Bureau of Textiles and Furs stated:

> That the testing of wool products for fiber content can be performed in a reasonably brief period of time by laboratory personnel * * *. The methods for such testing are established and generally accepted scientific procedures for qualitative and quantitative analyses. These tests have been performed as a matter of routine for over fifteen (15) years in the Commission's laboratory and found to be accurate and reliable.

(App. 111). The Assistant Director also stated that the Commission had approved eleven private laboratories for performance of testing under the Rule, and that several other private laboratories were under consideration when the preliminary injunction was issued. (App. 111-12).[5/]

5/ The affidavit of Idelle M. Shapiro, a textile technologist, employed by the Bureau of Textile and Furs in charge of the Bureau's testing laboratory in Washington, gave further details of the testing procedure:

> The testing of wool products for fiber content involves long recognized scientific techniques. Wool products can be tested for fiber content through the use of established chemical and microscopic procedures for qualitative and quantitative analysis. These methods which have been prescribed and published by the ASTM [American Society For Testing and Materials] and the AATCC [American Association of Textile, Chemists and Colorists], have been proven to be accurate, reliable and reproducible and are used by government and non-government laboratories. Additionally, there are many authoritative published references dealing with fiber identification and analysis. A quantitative analysis of a wool product containing more than one fiber can be accurately performed by these methods in a relatively short period of time. A quantitative microscopic analysis can be usually completed in three hours or less. A quantitative chemical analysis usually requires approximately four hours for a two fiber

(Footnote cont'd)

STATUTES AND REGULATIONS INVOLVED

Rule 36, 16 C.F.R. 300.36, is set forth at pp. 26-32 of the Appendix.

Section 6(a) of the Wool Products Labeling Act, 15 U.S.C. 68d(a) provides as follows:

> (a) Except as otherwise specifically provided herein, sections 68-68j of this title shall be enforced by the Federal Trade Commission under rules, regulations and procedure provided for in the Federal Trade Commission Act.
>
> The Commission is authorized and directed to prevent any person from violating the provisions of sections 68-68j of this title in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of sections 68-68j of this title; and any such person violating the provisions of said sections shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of sections 68-68j of this title.

5/ (Footnote cont'd)

> analysis, with an additional three or four hours being required for each additional fiber type to be analyzed. The reason for the longer times is that samples must be dryed in an oven after each procedure. The actual time a technician spends working on a sample is minimal and numerous samples can be tested at the same time. An analysis of a product containing only one fiber or a qualitative analysis of several fibers can be made in a matter of minutes.

(App. 114-15).

> The Commission is authorized and directed to make rules and regulations for the manner and form of disclosing information required by sections 68-68j of this title, and for segregation of such information for different portions of a wool product as may be necessary to avoid deception or confusion, and to make such further rules and regulations under and in pursuance of the terms of said sections as may be necessary and proper for administration and enforcement.
>
> The Commission is also authorized to cause inspections, analyses, tests, and examinations to be made of any wool products subject to sections 68-68j of this title; and to cooperate with any department or agency of the Government, with any State, Territory, or possession, or with the District of Columbia; or with any department, agency, or political subdivision thereof; or with any person.

Section 8 of the Wool Products Labeling Act, 15 U.S.C. 68f, provides in relevant part as follows:

Exclusion of misbranded wool products

> All wool products imported into the United States, except those made more than twenty years prior to such importation, shall be stamped, tagged, labeled, or otherwise identified in accordance with the provisions of sections 68-68j of this title, and all invoices of such wool products required under subtitle IV of chapter 4 of Title 19, shall set forth, in addition to the matter therein specified, the information with respect to said wool products required under the provisions of sections 68-68j of this title, which information shall be in the invoices prior to their certification under chapter 4 of Title 19.

* * * *

Section 499 of the Tariff Act of 1930, as amended, 19 U.S.C. 1499, provides in relevant part as follows:

> Imported merchandise, required by law or regulations made in pursuance thereof to be inspected, examined, or appraised, shall not be delivered from customs custody, except under such bond or other security as may be prescribed by the Secretary of the Treasury to assure compliance with all applicable laws, regulations, and instructions which the Secretary of the Treasury or the

Customs Service is authorized to enforce until it has been inspected, examined, or appraised and is reported by the appraiser to have been truly and correctly invoiced and found to comply with the requirements of the laws of the United States. The collector shall designate the packages or quantities covered by any invoice or entry which are to be opened and examined for the purpose of appraisement or otherwise and shall order such packages or quantities to be sent to the public stores or other places for such purpose. * * *

19 C.F.R. 11.12 provides in relevant part as follows:

(a) Wool products imported into the United States, except those made more than 20 years prior to importation, and except carpets, rugs, mats, and upholsteries, shall have affixed thereto a stamp, tag, label, or other means of identification, as required by the Wool Products Labeling Act of 1939 * * *.

(b) If imported wool products are not correctly labeled and the collector is satisfied that the error or omission involved no fraud or willful neglect, the importer shall be afforded a reasonable opportunity to label the merchandise under customs supervision to conform with the requirements of such act and the rules and regulations of the Federal Trade Commission. * * *.

(c) Packages of wool products subject to the provisions of this section which are not designated for examination may be released pending examination of the designated packages, but only if there shall have been filed in connection with the entry the usual customs single entry or term bond in such amount as is prescribed for such bonds in §§ 25.3 and 25.4 of this chapter.

(d) The collector of customs shall give written notice to the importer of any lack of compliance with the Wool Products Labeling Act of 1939 in respect of an importation of wool products, and pursuant to § 8.26 of this chapter shall demand the immediate return of the involved products to customs custody, unless the lack of compliance is forthwith corrected.

(e) If the products covered by a notice and demand given pursuant to paragraph (d) of this section are not promptly returned to customs custody and the collector is not fully satisfied that they have been brought into compliance with

> the Wool Products Labeling Act of 1939, appropriate action shall be taken to effect the collection of liquidated damages in an amount equal to the entered value of the merchandise not redelivered, plus the estimated duty thereon as determined at the time of entry, unless the owner or consignee shall file with the appropriate customs officer an application for cancelation of the liability incurred under the bond upon the payment as liquidated damages of a lesser amount than the full amount of the liquidated damages incurred, or upon the basis of such other terms and conditions as the Secretary of the Treasury may deem sufficient. * * *
>
> * * * *

SUMMARY OF ARGUMENT

1. Under Section 499 of the Tariff Act of 1930, 19 U.S.C. 1499, imported merchandise "shall not be delivered from customs custody, except under such bond or other security * * * to assure compliance with all applicable laws * * * which the Secretary of the Treasury or the Customs Service is authorized to enforce until it has been * * * examined * * * and found to comply with the requirements of the laws of the United States." The legislative history of the Wool Products Labeling Act shows that it is a law "which the Secretary of the Treasury or the Customs Service is authorized to enforce"; Congress intended Section 8 of the Act, excluding mislabeled woolen products from entry into the United States, to be enforced through existing Customs procedures. Accordingly, it is clear that the Bureau of Customs may exclude wool products at the ports of entry, or admit them under bond, pending the results of testing to determine the accuracy of the labels.

The only remaining question, then, is whether the Federal Trade Commission has the authority to interject itself into this established Customs procedure by assuming the task of advising the Bureau of Customs when imported wool products should be released from Customs custody. Section 6 of the Wool Products Labeling Act authorizes the Commission to "cooperate with any department or agency of the Government." 15 U.S.C. 68d. Section 6 also authorizes the Commission to "cause inspections, analyses, tests, and examinations to be made of any wool products subject to [the Act]." Ibid. This authority, in conjunction with the Commission's general power under Section 6 to make such rules and regulations "as may be necessary and proper for administration and enforcement", is sufficient to support a rule which merely regularizes the basis on which the Commission will cooperate with the Bureau of Customs in enforcing the Wool Products Act through established Customs procedures.

2. The lack of any provision for a hearing in Rule 36 does not violate due process. Where property rights only are involved, there is no requirement that a hearing precede the effectiveness of administrative action. Ewing v. Mytinger & Casselberry, 339 U.S. 594. Indeed, any other rule would make it impossible to enforce laws regarding exclusion of imports; if imported merchandise is to be inspected and tested at the ports of entry, clearly there must be some procedure under which the merchandise can be temporarily detained at the point of entry so that inspection and testing can be performed. Nor does the lack of provision in Rule 36 for a hearing or judicial review at any stage vitiate the Rule. In the first

place, an importer is not constitutionally entitled to a hearing or judicial review in connection with enforcement of laws regarding exclusion of imported merchandise. Buttfield v. Stranahan, 192 U.S. 470 (1903). Moreover, even if the importer had a right to a hearing and judicial review, his right could be vindicated in the Customs Court or in a district court under the Administrative Procedure Act, regardless of the lack of provision in Rule 36 for a hearing or judicial review.

3. The issues raised in this case are not ripe for judicial resolution. There has been no change in the substantive labeling requirements with which the importers must comply; rather, Rule 36 affects only enforcement procedures. And the Commission's stated intention has been not to enforce the Rule in a manner having a substantial impact om the importers' day-to-day business, but rather, in the normal situation, to withhold Customs release only of samples for testing purposes. Thus there is no need for pre-enforcement review here. Moreover, the issues raised here could be affected by the manner in which the Rule is actually enforced, and thus it would be better to postpone judicial consideration of these issues until they arise in the context of actual enforcement.

ARGUMENT

I. THE FEDERAL TRADE COMMISSION HAS AUTHORITY UNDER THE WOOL PRODUCTS LABELING ACT TO ADOPT A PROCEDURE WHEREBY RELEASE OF IMPORTED WOOL PRODUCTS FROM CUSTOMS CUSTODY MAY BE WITHHELD PENDING THE OUTCOME OF TESTING.

Section 6 of the Wool Products Labeling Act authorizes the Commission to make rules and regulations concerning the

manner in which wool products must be labeled, and to make "such further rules and regulations under and in pursuance of the terms of [the Act] as may be necessary and proper for administration and enforcement." 15 U.S.C. 68d. The importers here do not contest the Commission's conclusion that Rule 36 is "necessary and proper for administration and enforcement" of the Act. As noted above, the Commission concluded that its lack of jurisdiction to inspect the plants of foreign manufacturers, and to require foreign manufacturers to keep records of the fiber content of their products, renders it impossible to keep mislabeled foreign wool products off the market unless testing is done at the time entry is sought through Customs. By testing at that time, the Commission is attempting to achieve with respect to imported wool products enforcement of equivalent effectiveness to the domestic enforcement achieved through inspection of the plants and records of domestic manufacturers. The Commission must, of course, be accorded a large degree of discretion in its judgment as to the practicalities of enforcement. Moog Industries, Inc. v. F.T.C., 355 U.S. 411; F.T.C. v. Universal-Rundle Corp., 387 U.S. 244. And clearly, it was reasonable for the Commission to conclude here that there is a practical need for testing wool imports at the point of entry through Customs.

The Commission's authority to adopt enforcement procedures which it concludes are necessary and proper is not unlimited. Section 6 requires that the rules adopted be "under and in pursuance of the terms of [the Act]". 15 U.S.C. 68d. Under this language, enforcement procedures adopted by

the Commission must, of course, be consistent with the terms of the Act. The importers' principal contention here is that Rule 36 is inconsistent with the Act. They argue that the Act itself provides specifically for several enforcement procedures, and that the Commission is prohibited from creating by regulation any additional enforcement procedures. Specifically, the importers point to the provision in Section 6 of the Act incorporating the remedial provisions of the Federal Trade Commission Act; to Section 7 of the Wool Products Labeling Act, 15 U.S.C. 68e, providing for condemnation and injunction suits in the district courts; and to Section 8 of the Act, 15 U.S.C. 68f, providing that any person who falsifies certain import documents may be prohibited from importing wool products except upon the filing of a penal bond. The importers contend that Rule 36 goes beyond these statutory procedures and is therefore beyond the Commission's authority.

The importers' argument, however, overlooks other provisions of the statute. Specifically, Section 6 of the Act authorizes the Commission "to cause inspections, analyses, tests, and examinations to be made of any wool products subject to [the Act]. Section 6 also authorizes the Commission to cooperate with any department or agency of the Government, * * *." 15 U.S.C. 68d. These provisions take on special importance in light of the fact that under the Tariff Act of 1930, 19 U.S.C. 1499, the Bureau of Customs is authorized to hold imported merchandise in Customs custody until it is either found to comply with the laws the Bureau of Customs

is authorized to enforce, or until a bond conditioned on compliance is furnished. The Wool Products Labeling Act is a law which the Bureau of Customs is authorized to enforce. Thus, the Bureau of Customs has clear statutory authority to test imports for compliance with the Wool Products Labeling Act prior to releasing them from Customs custody. All Rule 36 does is to interject the Federal Trade Commission into this Customs procedure, by conditioning release from Customs custody upon issuance of a notice of release by the Commission, after testing by the Commission or by Commission-approved private laboratories. The Commission's authority to establish rules and regulations for enforcement of the Act, in combination with its authority to cooperate with other agencies of Government and to test and examine wool products, is sufficient to authorize a Rule which merely establishes a procedure under which the Commission cooperates with the Bureau of Customs in carrying out the enforcement process authorized by the Tariff Act of 1930. And in view of the expertise which the Commission's Bureau of Textiles and Furs has developed over the years in the domestic enforcement of the Wool Products Labeling Act, it is surely reasonable and consistent with the Act for the Commission to make this expertise available to the Bureau of Customs in the performance of its statutory responsibilities.

We now show 1) that the Bureau of Customs is authorized to enforce the Wool Products Labeling Act by holding merchandise in customs custody until it is either found to comply with the labeling requirements of the Act, or a bond conditioned on compliance is furnished; and 2) that Rule 36

is a valid exercise of authority which the Commission has under the Wool Products Labeling Act to assist and cooperate in the enforcement of the Act through the established Customs procedure.

1. The Bureau of Customs is authorized to withhold release of wool imports from Customs custody in order to test them for compliance with the Wool Products Labeling Act. The Tariff Act of 1930 gives authority to the Bureau of Customs to refuse to release imported goods until they have been tested for compliance with the Wool Products Labeling Act. The Tariff Act of 1930 provides:

> Imported merchandise, required by law or regulations made in pursuance thereof to be inspected, examined, or appraised, shall not be delivered from Customs custody, except under such bond or other security as may be prescribed by the Secretary of the Treasury to assure compliance with all applicable laws, regulations, and instructions which the Secretary of the Treasury or the Customs Service is authorized to enforce until it has been inspected, examined, or appraised and is reported by the appraiser to have been truly and correctly invoiced and found to comply with the laws of the United States.

19 U.S.C. 1499. The only question in the application of this language is whether imported wool products are "required by law or regulations made in pursuance thereof to be inspected, examined, or appraised" and whether the Wool Products Labeling Act is a law "which the Secretary of the Treasury or the Customs Service is authorized to enforce." The answer to this question is found in the Wool Products Labeling Act and its legislative history.

Section 8 of the Wool Products Labeling Act, 15 U.S.C. 68f, entitled "Exclusion of misbranded wool products,"[6] provides generally that imported wool products "shall be stamped, tagged, labeled, or otherwise identified in accordance with [the Act]." In addition, Section 8 requires the consignee's declaration submitted under the Tariff Act to set forth the information required by the Wool Products Labeling Act. In a predecessor bill, Section 8 had provided that an import could be refused admission if the Commission certified to the Secretary of the Treasury that it had reason to believe that a misbranded product was being imported. S. 3052, 75th Cong. Under that bill, the importer at the subsequent hearing had "the burden of proof to show said wool product is not being imported, or offered for import, in violation of the provisions of the Act. S. Rep. No. 1685, 75th Cong., 3d Sess., at p. 4.[7] Senator Schwartz, the sponsor of the bill, explained

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6/ This title appears in Section 8 as originally passed. 54 Stat. 1132.

7/ Under the procedure of the predecessor bill, the Commission was required to give "notice of opportunity for appearance and hearing" to the importer before making the certification on the basis of which the Secretary of the Treasury could refuse admission. However, contrary to appellants' assertion (brief, p. 13, n. 8), the predecessor bill did not require the hearing to take place before imports could be excluded. This is made plain by Section 8(b) of the predecessor bill, which provided for a second certification to the Secretary of the Treasury in the event that the Commission decided, after hearing, that the imports were misbranded. S. Rep. No. 1685, 75th Cong., 3d Sess., at p. 4. (App. Vol. II Document E). Clearly, the first certification, on the basis of which the Secretary of the Treasury could exclude further imports, was intended to provide interim exclusion pending the outcome of the hearing.

during subcommittee hearings at the next Congress why the present Section 8 was substituted:

> New provision is substituted with respect to imports. It avoids unjust burden that might be imposed on importer under S. 3052, and it follows principle and utilizes forms and procedure provided for in Tariff Act of 1930.

Hearings before a Subcommittee of the Senate Committee on Interstate Commerce, on S. 162, Wool Products Labeling Act of 1939, 76th Cong., 1st Sess., at p. 7. (Emphasis added). At that time, the Tariff Act of 1930 included 19 U.S.C. 1499, providing for administrative exclusion of imports without a prior hearing. 46 Stat. 728.

The intention that the Bureau of Customs would conduct tests of imported wool products, and utilize existing Customs procedure to exclude misbranded products and to enforce the labeling requirements of the Wool Products Labeling Act, was made explicit by Senator Schwartz during the Senate debates preceding passage of the Act:

> It was and is also complained that it will be impossible to secure protection from imports from foreign countries. By tying in labeling with the customs laws and with cooperation from the Treasury Department the difficulties surmised will be overcome under the terms of Senate bill 162 and House bill 944. The Secretary of the Treasury, in his letter to the House committee, specifies the number and official character of employees needed at our ports and abroad to perform the duties required.

84 Cong. Rec. 9496 (July 19, 1939). Senator Schwartz then went on to read a letter from the Secretary of the Treasury stating that adoption of the bill would require the Department to hire "four examiners of merchandise and four clerks * * * in the offices of the respective appraisers of merchandise. It is also estimated that three junior analysts and

five assistant analysts will be required in the respective laboratories * * *." Ibid. Clearly, the understanding was that the Department of the Treasury required these additional employees only because the Bureau of Customs was required to enforce the Act through examination and testing of imported wool products.

Thus the Wool Products Labeling Act is clearly a law "which the Secretary of the Treasury or the Customs Service is authorized to enforce" within the meaning of 19 U.S.C. 1499, and imported wool products are required by the Act "to be inspected, examined, or appraised" by Customs officials. 19 U.S.C. 1499 is precisely applicable, and that statute authorizes the Bureau of Customs to withhold release except upon furnishing a bond, until testing shows that the imported goods conform to the Wool Products Labeling Act. 19 U.S.C. 1499 was in effect, as part of the Tariff Act of 1930, when the Wool Products Labeling Act was adopted. 46 Stat. 728, as amended by 52 Stat. 1084. Thus Section 1499 was one of the existing customs procedures which Congress expected the Bureau of Customs to follow in enforcing Section 8 of the Wool Products Labeling Act.

Further confirmation of the authority of the Bureau of Customs to withhold release of mislabeled wool products -- without first holding a hearing -- is found in a regulation adopted by the Commissioner of Customs shortly after adoption of the Wool Products Labeling Act, before the Act went into effect. This regulation adopted the requirement of Section 8 of the Wool Products Labeling Act that imported products be correctly labeled, and then provided:

> (c) Packages of wool products subject to the provisions of this article which are not designated for examination may be released pending examination of the designated packages, but only if there shall have been filed in connection with the entry the usual customs single entry bond * * *.

See 6 F.R. 2480 (May 20, 1941).[8/] Further provisions of the regulation stated that if tests show mislabeling, immediate return of the goods released under the bond could be demanded or liquidated damages in the amount of the value of the goods collected, unless the lack of compliance was corrected. Ibid. This regulation is presently in effect. See 19 C.F.R. 11.12. As a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new", (Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315), this regulation is persuasive support for the conclusion that Congress intended the Wool Products Labeling Act to be enforced by the Bureau of Customs through withholding release of imported wool products from Customs custody pending the results of testing.

Section 8 of the Wool Products Labeling Act provides that falsification of import invoices or of the consignee's declaration with respect to imported wool products is an unfair method of competition and an unfair and deceptive act or practice under the Federal Trade Commission Act; and that any person

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8/ The Wool Products Labeling Act was enacted on October 14, 1940, to be effective nine months after the date of passage. 54 Stat. 1133.

who commits such falsification may thenceforth be prohibited by the Commission from importing any wool products except upon filing a bond in a sum double the value of the import and any duty. 15 U.S.C. 68f. Appellants argue that this is the only procedure whereby imported wool products may be excluded at the border -- that unless the importer has been found to be guilty of falsification in his invoice or declaration, he can bring in wool products without first submitting them to inspection and testing at the border.

However, there is nothing in the statute to indicate that imported wool products may be excluded only when the importer is found to have falsified the invoice or consignee's declaration. Indeed, as we have noted, Congress intended Section 8 to be enforced through existing Customs procedure; and these procedures, under 19 U.S.C. 1499, included withholding release of all products at the border pending inspection and testing for compliance with law. Moreover, the pertinent House Committee report shows conclusively that Congress intended the procedure set forth by Section 8 for cases of falsification of import documents to be an additional means of enforcement, rather than the exclusive means for enforcing the exclusion of mislabeled wool imports. The report states:

> Section 8 provides for the exclusion of misbranded wool products from the United States * * * unless stamped, tagged, labeled, or otherwise identified in accordance with the provisions of this act; and all invoices of such wool products are required to set forth the information required under this act and [the Tariff Act of 1930].
>
> The section also deals appropriately with falsification of invoices, or failure to furnish

> the required information, or perjury in the consignee's declaration, and such persons may be prohibited from importing any wool products, except upon filing, with the Secretary of the Treasury, bond in double the sum of the value of the products and duty thereon. * * * *

H. Rep. No. 907, 76th Cong., 1st Sess., at 11.[9/] As this language indicates, Congress viewed the exclusion of mislabeled wool products, and the prohibition against falsification of import documents, as separate though related problems, with separate enforcement procedures. The intent was not to confine the Bureau of Customs, in enforcing the exclusion of mislabeled wool products, to the procedure set forth for falsified import documents.

2. Rule 36 is a valid exercise by the Federal Trade Commission of its authority under the Wool Products Labeling Act to conduct tests and cooperate in the enforcement of the Act through established Customs procedures.

The effect of Rule 36 is to interject the Federal Trade Commission's Bureau of Textiles and Furs into the established Customs procedure authorized by 19 U.S.C. 1499 and 19 C.F.R. 11.12. The Rule simply means that Commission employees, rather than Bureau of Customs employees, perform the necessary inspections and tests, and determine whether imported wool products are correctly labeled so that they may be released from Customs custody. In this manner, the expertise of the Commission's Bureau of Textiles and Furs, developed in connection with domestic enforcement, may be utilized in

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9/ This Committee Report concerned H.R. 944; another bill was passed, but Section 8 of H.R. 944 (which is set forth in full in the report) was identical to Section 8 of the Act as finally passed.

connection with the determinations that the Bureau of Customs is required to make at the ports of entry. In view of the clear intent of Congress to utilize existing Customs procedures for enforcement of the Wool Products Labeling Act, the adoption of Rule 36 in no way departs from the enforcement scheme established by the Act. The Commission's authority "to cause inspections, analyses, tests, and examinations to be made of any wool products subject to [the Act]", combined with its authority "to cooperate with any agency of the Government" (15 U.S.C. 68d), furnishes ample statutory basis for the participation of the Commission's Bureau of Textiles and Furs in enforcement of the Act through established Customs procedures. And the Commission's general authority to make "such further rules and regulations under and in pursuance of the terms of [the Act] as may be necessary and proper for administration and enforcement" (15 U.S.C. 68d) is ample basis for a regulation which establishes a formal procedure defining the duties and responsibilities of the Bureau of Textiles and Furs in connection with the established Customs procedure. Over the years, the Bureau of Textiles and Furs has developed considerable expertise in the enforcement of the Wool Products Labeling Act. There is surely nothing inconsistent with the Act in permitting that expertise to be made available on a formalized basis to the Bureau of Customs in connection with its responsibility to exclude mislabeled wool products from entering the country.

II. THE LACK OF ANY PROVISION FOR A HEARING IN RULE 36 DOES NOT VIOLATE DUE PROCESS.

It is argued that the lack of any provision for a hearing in Rule 36 violates due process. This argument is based on 1) the fact that the Rule authorizes the holding of goods in Customs custody before a hearing is held; and 2) the fact that the Rule itself makes no provision for an administrative or judicial hearing after release from Customs custody has been withheld.

1. The law is clear that, at least where only property rights are involved, due process does not require a hearing prior to the effectiveness of an administrative determination. This was held in Ewing v. Mytinger & Casselberry, 339 U.S. 594, also a misbranding case, where there was "no claim that the ingredients of the preparation are harmful or dangerous to health." 339 U.S. at 596. In the customs area, the practicalities of the situation are such that an administrative decision regarding the exclusion of imported goods must take at least temporary effect before a hearing can be held. The only alternative is to release the goods into the country without bond, in which case the whole question of whether they should be excluded would become moot. It is for this reason that the Tariff Act of 1930 provides that imported merchandise that must be inspected "shall not be delivered from customs custody"

except under bond, until the necessary inspection has been performed. 19 U.S.C. 1499. This is a power which the Bureau of Customs must have, if laws regarding exclusion of imports are to be enforced. And if due process permits the Bureau of Customs to exclude imports pending inspection and testing, clearly the Federal Trade Commission may also do it, given adequate statutory authority.

The Supreme Court has held that Congress may constitutionally provide for exclusion of imports without an administrative hearing, or judicial review, at any stage. See Buttfield v. Stranahan, 192 U.S. 470, sustaining summary administrative refusal to admit a shipment of tea under the Tea Inspection Act:

> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised.
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> * * * *
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> It is urged that there was denial of due process of law in failing to accord plaintiff in error a hearing before the Board of Tea Inspectors and the Secretary of the Treasury in establishing the standard in question, and before the general appraisers upon the reexamination of the tea. * * * [W]e are of the opinion that the statute was not objectionable for that reason. The provisions in respect to the fixing of standards and the examination of samples by government experts was for the purpose of determining whether the conditions existed which conferred the right

> to import, and they therefore in no just sense concerned a taking of property. This latter question was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of the agents of the government, upon whom power on the subject was conferred.

See also Sugarman v. Forbragd, 267 F. Supp. 817 (N.D. Cal. 1967). Clearly, if summary administrative exclusion of imports, without a hearing or judicial review at any stage, is constitutional, then rejection without a prior hearing or judicial review is also constitutional.

Exclusion of imports pending final administrative determination could, of course, be extremely harsh to the importer, if there was widespread withholding of Customs release, and lengthy periods of time were taken to make the required tests. However, in its Statement of Basis and Purpose accompanying issuance of Rule 36, the Commission stated that it would "continue to permit goods to pass through Customs and into the hands of the importer subject to the terms and conditions of the bond and Section 300.36 (Rule 36) even in those instances where goods are required to be tested." (App. 35). In addition, the Commission stated, "[e]very effort has been made to minimize delays." (App. 36). Appellants, by bringing this action and obtaining a preliminary injunction, have prevented the accumulation of any substantial enforcement experience to date under Rule 36. Thus they are hardly in a position now to question the Commission's statement of intention regarding enforcement of the Rule, or to assert that it will be enforced in a manner causing unnecessary hardship.

2. The fact that Rule 36 itself provides for no administrative hearing or judicial review at any stage of the proceedings, does not mean that a hearing and judicial review is not available, if it is otherwise required by law. Once the Commission has finally decided not to issue a notice of release, the importer may obtain judicial review -- if such review is required -- either in the Customs Court under the Tariff Act, 19 U.S.C. 1514, or, if Customs Court review is not available, in a district court under Section 10 of the Administrative Procedure Act. 5 U.S.C. 701, et seq.(Supp. III, 1965-67).[10/] Even if the Commission had purported to deny

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10/ Customs Court review is available for "all decisions of the collector [of customs], including * * * decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, * * *." 19 U.S.C. 1514, 1515. Customs Court jurisdiction is exclusive. 28 U.S.C. 1583. There would be a question as to whether a case under Rule 36 is an action to review a decision of the collector of customs -- who would have custody of the goods and would be the official actually withholding entry -- or a decision of the Federal Trade Commission. There would also be a question as to whether Section 8 of the Wool Products Labeling Act is a "provision of the customs laws." In Precise Imports Corporation v. Kelly, 378 F. 2d 1014 (2d Cir. 1967), certiorari denied 364 U.S. 891, exclusion of imports under the Switchblade Knife Act was held reviewable in the district court rather than the Customs Court. However, Section 8 of the Wool Products Labeling Act applies specifically to imports, while the provision of the Switchblade Knife Act involved in Precise Imports was of general application.

If review does not lie in the Customs Court, jurisdiction over any review action would be in the district court. Precise Imports v. Kelly, supra. The scope of review could be very limited; it might be determined that the determination of fiber content and adequacy of labeling was a matter wholly committed to agency discretion, within the meaning of the Administrative Procedure Act. 5 U.S.C. 701 (Supp. III, 1965-67); Sugarman v. Forbragd, 267 F. Supp. 817 (N.D. Cal. 1967).

importers judicial review of determinations under Rule 36,[11] it clearly could not do so if judicial review is required by law. And if the importer is entitled to a hearing and has received no hearing administratively, he could obtain a hearing in the Customs Court or the district court.[12] It may well be that an importer would not be entitled to a hearing, or to judicial review; as we have noted, Congress has the power to exclude imports through summary proceedings. Buttfield v. Stranahan, 192 U.S. 470; Sugarman v. Forbragd, 267 F. Supp. 817

11/ Chairman Dixon did not think this was the Commission's intent; he stated that Commission action under Rule 36 would be reviewable under Section 10 of the Administrative Procedure Act for arbitrariness or abuse of discretion. (App. 86).

12/ If a trial-type hearing were appropriate and had not been provided administratively, it could be held in court. See Davis, Administrative Law (1958 ed.) §7.10: "Many cases uphold administrative action on the ground that opportunity for de novo judicial review supplies administrative procedural deficiencies." Section 10 of the Administrative Procedure Act, 5 U.S.C. 706(2)(F) (Supp. III, 1965-67) provides for trial de novo in the reviewing court where appropriate. We would not concede that such a trial would be appropriate in Rule 36 cases. But the important point here is that if the importer is entitled to a hearing and does not receive it administratively, the courts could give him a judicial hearing.

The appropriateness of a trial-type hearing in Rule 36 cases is questionable. Section 5 of the Administrative Procedure Act, setting forth standards for adjudicating agency hearings, excepts "proceedings in which decisions rest solely on inspections, tests, or elections." 5 U.S.C. 554(a)(3). In addition, Section 5 applies only to adjudications "required by statute to be determined on the record after opportunity for an agency hearing"; there is no such statute here.

(N.D. Cal. 1967). But the important point here is that the courts have ample power to provide the importer with a hearing and judicial review if he is entitled to them, despite the silence of Rule 36 on the subject. Thus the failure of Rule 36 to provide for a hearing and judicial review does not affect its validity.

III. THIS CHALLENGE TO RULE 36 IS NOT RIPE FOR JUDICIAL RESOLUTION.

In three recent cases, the Supreme Court laid down the standards for when actions seeking declaratory judgments as to the validity of administrative regulations, prior to enforcement of the regulations, would be considered to be ripe for judicial resolution. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967); and Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967). In Abbott Laboratories v. Gardner and Gardner v. Toilet Goods Ass'n, pre-enforcement review was held permissible, while in Toilet Goods Ass'n v. Gardner, an action seeking pre-enforcement review was held not to be ripe. In our view, the present case is on all fours with Toilet Goods v. Gardner and, under that decision, is not ripe for judicial resolution.

In Toilet Goods v. Gardner, the Commissioner of Food and Drugs, acting under statutory authority "to promulgate regulations for the efficient enforcement" of the Act, adopted a regulation requiring his inspectors to be given free access to all manufacturing facilities involved in the manufacture of color additives. See 387 U.S. at 161. The Supreme Court concluded that judicial resolution of the question of the statutory authority for this regulation

> will depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets * * *. We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.

387 U.S. at 163-4. Similarly here, the effectiveness of Rule 36 in solving the Commission's enforcement problems, the problems which enforcement of the Rule may create for the importers, and the manner in which the Rule is enforced, are surely factors that should be assessed in determining whether the Rule is consistent with the statutory scheme of the Wool Products Labeling Act. And "judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here." Ibid.

In Abbott Laboratories v. Gardner and Gardner v. Toilet Goods Ass'n, pre-enforcement review was allowed of regulations which, unlike here, promulgated substantive standards with which the regulated industries were required to comply, subject to risk of criminal penalties. These were "self-executing" regulations, with "an immediate and substantial impact" on the regulated industries, affecting directly their "day-to-day business." 387 U.S. at 152, 171. By contrast, none of the substantive requirements of wool labeling have been changed here. And the Commission has said that it intends to enforce the Rule so that normally only isolated samples of goods will be

withheld from immediate Customs release for testing purposes. (App. 35). Thus Rule 36 should not be disruptive of the importers' day-to-day operations. There is no necessity here for pre-enforcement review, and the Court's consideration of the questions raised here could be assisted if the case arose in the context of actual enforcement.

CONCLUSION

The judgment of the district court dismissing the complaint should be affirmed.

Respectfully submitted,

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DECEMBER 1968

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,505

TEXTILE AND APPAREL GROUP, AMERICAN IMPORTERS ASSOCIATION, et al.,

Appellants,

v.

FEDERAL TRADE COMMISSION, et al.,

Appellees.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, 1968, I served the attached Brief for the Federal Trade Commission upon counsel for the Appellants and counsel for Co-Appellee, by mailing two copies, postage prepaid, to:

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